THE "LEGAL HISTORY"

OF

CANON STUBBS:

BEING

THE BASIS OF THE NEW SCHEME

OF

ECCLESIASTICAL COURTS

PROPOSED BY

The Royal Commissioners of 1881-3.

REVIEWED BY

J. T. TOMLINSON

(LAY-MEMBER OF THE MANCHESTER DIOCESAN CONFERENCE).

SECOND EDITION.

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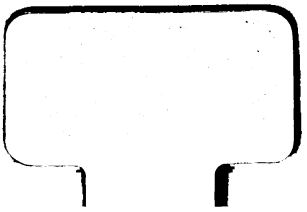

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ANALYSIS

OF THE

REPORT OF THE ROYAL COMMISSION

APPOINTED TO

"INQUIRE INTO THE CONSTITUTION AND WORKING OF THE ECCLESIASTICAL COURTS, *AS* CREATED OR MODIFIED UNDER THE REFORMATION STATUTES OF THE 24 AND 25 HENRY VIII, AND ANY *SUBSEQUENT* STATUTES,"

MAY 16, 1881.

N.B.—*The references throughout are to Vol. I. of the Report, except otherwise specified. The figures* i. *and* ii. *relate to the column of the page named.* **Figures in block type** (*e.g.* **25**) *relate to pages of this Pamphlet.*

CHAPTER I.

INTRODUCTION.

ORIGIN OF THE ROYAL COMMISSION.

THE failure in 1850 of the attempt to overthrow the Gorham Judgment was due to a unanimous declaration by all the Judges of the Queen's Bench, of the Exchequer, and of the Common Pleas,* that no appeal in heresy lay from the Court of Arches to Convocation, and that 24 Hen. VIII, c. 12, s. 4, was "in effect repealed" by the "subsequent statute," 25 Hen. VIII, c. 19.† Many Churchmen

* These judgments are given at length in Dr. Stephens' "Notes, Legal and Historical, on the Book of Common Prayer," Vol. II., pp. 1382-1419.

† These two statutes are "The Reformation Statutes" named in the Royal Commission; and the Judicial Committee of Privy Council succeeded the Court of Delegates created by 25 Hen. VIII, c. 19.

felt strongly upon the subject, amongst whom was Mr. Gladstone, the head of the present Government. His opinions, which may be fairly taken to represent those of a party in the Church, were published during the same year (1850) in a pamphlet on the "Royal Supremacy," in which he attacked the Judicial Committee of Privy Council. This pamphlet he has reprinted at various dates, in 1865, 1877, and 1879, thus showing the persistence of his hostility to the Judicial Committee.

From the published "Life of Bishop Wilberforce," it appears that in consultation with Sir R. Phillimore and the then Bishop of Oxford, Mr. Gladstone concerted several schemes for getting rid of the Judicial Committee. One such scheme, that of 1855, embraced the main features of the scheme of the Royal Commissioners, 1883. It proposed to "repeal the Act of Wm. IV" constituting the Judicial Committee; to give "a reference which need not be binding, "to the Bishops of the province;" "letting the Lay Court, as a "Lay Court, decide the individual cause, and trying to guard the "precedent." In reporting this, Bishop Wilberforce adds:—

"Gladstone looks forward to clerical Chancellors, when the clergy are "educated for it hereafter."—*Life of Bishop Wilberforce*, II-288.

The reproduction of these ideas in the Report of the Royal Commissioners may perhaps not be surprising when it is remembered that Mr. Gladstone was in a position to select the members of the Commission, and (as we learn from the minutes of the second meeting) gave a dispensation for non-attendance to a Commissioner (Mr. Freeman) who was appointed on the sub-committee to draft the Report. Even the points which are omitted by the Commissioners were indicated for postponement years ago by Mr. Gladstone, who remarked as to the "discrepancies "of the law" (which surely must affect the "working of the "Ecclesiastical Courts"), that—

"This might be dealt with *at an after time*, the rule in our time being, "as to all Church matters, to put the cart before the horse."—*Life of Bishop Wilberforce*, III-105.

This may explain what is otherwise inexplicable: the total ignoring in the Report of the chaotic state of the so-called "law" now administered in Ecclesiastical Courts. It explains also the selection

of pronounced Ritualists, like the Marquis of Bath, the Earl of Devon, member of the English Church Union; Sir R. Phillimore (who in the Bennett Case pronounced an "extra-judicial opinion" in favour of "the adorable sacrifice of the Mass"*); Bishop Mackarness (ex-member of the English Church Union, who claimed† to have "vindicated the old historical independence of the Church Courts" by vetoing the Clewer Case); Dean Lake, Canon Stubbs, and Prebendary Ainslie (all signatories of the "Remonstrance" against the Purchas Judgment); Mr. Freeman (a well-known admirer "of S. Thomas of Canterbury" and apologist for mediæval institutions); Sir R. Cross, and Mr. Whitbread, both of whom voted against allowing any appeal from the Bishops' veto when the Public Worship Regulation Bill was before the Commons; and Mr. Charles, the counsel of the English Church Union: these, from their known antecedents, seemed likely to secure the wished-for result which Mr. Gladstone had indicated; while the Bishops of Winchester and Truro might be paired off against the two Archbishops—who, of course, were inevitable. There remain only to be enumerated—beside Lord Coleridge, Canon Westcott and Mr. Jeune—Lord Penzance, Rev. Chancellor Espin, and Dr. Deane (whose professional existence is bound up with the "Spiritual Court" system); two clerically-minded laymen, Lord Blachford‡ and Sir W. James; and last of all two (!) evangelicals, the Earl of Chichester and Dean Perowne, who not being specially conversant with the subject would be unlikely to issue a separate Report.

It is known that a methodized and systematic agitation had been kept up for years, stimulated by controversial writers who attacked each judgment of the Privy Council in turn, accusing Lords Selborne, Cairns, Hatherley, Chelmsford, Kingsdown, and their colleagues, of ignorance, incompetence, and dishonesty. Meetings had been held in various parts of the country, at which these incriminating statements were reiterated, until, being seldom contradicted, they came to be regarded in some quarters as beyond

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* *See* p. 18 of "Is Lord Penzance fit to succeed Sir R. Phillimore?" (London: Marlborough, 51, Old Bailey. Price 1d.)

† Report, Vol. II., p. 196.

‡ Author of the Apophthegm, "Cranmer burnt well," preserved in Rev. T. Mozley's "Reminiscences," Vol. II., p. 230.

contradiction! The result was the production of considerable discontent.

The Royal Commissioners very properly invited representative men to explain the grounds of their discontent, but unhappily no attempt was made to tabulate or to compare the curiously-inconsistent and conflicting replies. As, however, the evidence thus given is supposed to be in some sense the basis of the recommendations for future legislation, an Analytical Index is submitted herewith, to enable students of the Report to see at a glance the extravagant incoherence of views now entertained. (*See* p. 93.)

The examination of witnesses was conducted "with wisdom, "experience, and tact" (as his fellow-Commissioners gratefully acknowledge, p. 11) by Archbishop Tait, whose unshaken Protestantism is seen throughout in his shrewd exposure of sentimental grievances. (*See* especially Qq. 5902, 5961-2, 5975, 6176, 6240-1, 6251, 6873.) His views were known to be favourable to the retention of the Judicial Committee of the Privy Council, for reasons which he published in his preface to "Brodrick and "Fremantle's Privy Council Judgments," and again in 1877 in "The Church and Law." But his health was known to be failing, and he died on December 3, 1882. A resolution to postpone the consideration of the final Court of Appeal till "the spring of 1883" was moved by the Marquis of Bath on July 21st, 1882. The resolution was lost: but that proved to be the last meeting which the Archbishop was able to attend; the sub-committees for drafting the Report having been appointed only the day before. His Grace's absence was a grievous loss to the Church, for we can hardly doubt that many obnoxious proposals which were carried by narrow majorities—seven to five, nine to eight, and nine to seven (*see* minutes of subsequent meetings)—would have been rejected had the chair been occupied by Archbishop Tait.

The attack upon the Judicial Committee had, however, been in preparation long before this. So early as the third meeting, June 17th, 1881, Canon Stubbs submitted suggestions on the method of treatment of historical questions, which were printed: on July 14th these were "amplified and explained," and notice was given to move for returns: on July 22nd he moved accordingly for eight returns, the first of which he "offered himself to make" to eluci-

date "the constitution and working of the Ecclesiastical Courts as "created, modified, *or otherwise recognized* under the Reformation "Statues of the 24th and 25th years of King Henry VIII, and "subsequent statutes." The interpolation of "otherwise recog- "nized" enabled the abolished and suppressed courts to be included as well as those indicated in the terms of the Royal Commission.

The second return moved for, and furnished by Canon Stubbs, was a list of trials for heresy "UP TO the year 1533." This seemed a curious way of illustrating the working of courts "created "or modified" at that very date!* But, whatever the intention, it led to the exclusion of the case of Lambert, who, in 1538, appealed from the Court of the Archbishop, and was tried for heresy by the King sitting in person, with the whole peerage and the twelve judges acting as assessors. It enabled also the trials for heresy in the reign of Mary to be hidden from consideration, for though subsequent in date, they illustrate the received theory of the Un-Reformed Anglo-Roman Church, seeing that Mary sought throughout to go back to the "twentieth year" of Hen. VIII. Such details would have been fatal to Canon Stubbs' theory; because, as Mr. Droop brought to his notice [Vol. II., p. 94, Q. 2165], Cranmer was examined by the commissary of the Pope who sent his sentence of condemnation for heresy direct from Rome; and as it was essential to the argument that the jurisdiction of the Pope in heresy should be denied, the economy of excluding this evidence by limiting the return to the period prior "to the year 1533" will be obvious.

On November 3rd, 1881, the returns are reported as "made by "Canon Stubbs," and were printed. On December 20th he added an "explanatory note." On February 23rd, 1882, the preparation of "a preliminary Report as to the historical matters considered by "the Commission" was postponed "until the *materials for such a*

---

* It should be understood that the list gives a mere per-centage of the recorded cases. It excludes men like James Bainham, burned only a few weeks after "the Great Statute of Appeals" (Brewer's "State Papers," V-772), upon a sentence given only by the Vicar-General, April 20, 1532. It excludes also, John Frith, the indignation at whose death is supposed to have occasioned the passing of 25 Hen. VIII, c. 14 (Foxe, Act and Mon. V-66, note), and scores of others.

"*report* had been collected by Canon Stubbs, who had undertaken "the *collection*." This was six months before it was (on July 20th) "resolved that Canon Westcott, Canon Stubbs, and Mr. E. A. "Freeman be appointed as a committee to *frame* drafts of those "portions of the Report which will deal with—

(1) "The origin and nature of the ecclesiastical jurisdiction over "clergy and laity.

(2) "The principle of the limitations and restraints of it imposed by "the civil power.

(3) "An account of the courts which have exercised ecclesiastical "jurisdiction in England," &c. &c.

It turns out that all this was a foregone conclusion. The so-called "Historical Appendix" (p. 21) was written, as the Report states, by a "member of our body" (p. xvi.), viz., Canon Stubbs, and was written *expressly* as a "Draft Report" (*see* p. 47, col. i.), containing curious "asides" or rubrics as to arguments to be expanded, or varied by the "reporters." [*See* p. 29, col. ii.; 31-i.; 41-i.; compare p. 37 with Report, xxxi.] The two other committee-men were merely "Assessors" in the sense of the Report, and the Report itself from pp. xvii. to xlv. is "taken over bodily" with a few transpositions, from this "Historical Appendix." The tentative suggestion (p. 39-i.) "it *might* be argued" is changed into the bolder statement "it "would seem from this." (p. xxix.) Once the Report fairly contradicts the Draft when it says (p. 46-ii.), "it is *not* easy to adduce "instances" of a Bishop sitting in his own court since the Reformation; this is changed (p. xxxviii.) into the positive statement, "instances may be adduced." With such trivial changes, however, we may say that the theoretical portion of the Report was written by Canon Stubbs.

It would seem that his "Draft Report" was written mainly with the purpose of attacking the Judicial Committee of the Privy Council. Strong feeling on the subject is shown, for instance, in the suggestion (on p. 48-ii.) that the Delegates suppressing the "grounds of their decisions had at all events the effect of saving "the country from the infliction of an *authoritative* exposition "of law from *inexperienced* judges." In copying the passage into the Report (p. xliv.), this was wisely left out. Similarly, on p. xl.,

the Commissioners omit an attack (in p. 50-ii. of the Draft) upon "prelates like Parker, Andrewes and Laud" for being "content to act under such commissions" as are irreconcilable with Canon Stubbs' theories. He sums up his paper (p. 51) in a series of "conclusions" of which we may notice the last three. In the seventh, he repeats his objection to the Judicial Committee, viz., that the Act appointing the Privy Council in lieu of the Delegates did not make "any provision for the trying of such points *by judges* "*who had either spiritual authority or theological competence.*" His eighth conclusion is that the existing state of things has been brought about by "the assumption of successive generations of "lawyers, and the *lâches* or want of foresight on the part of the "clergy." His final conclusion, to which all the paper has been working up, is "that under these circumstances the maintenance of "the existing jurisdiction of the Judicial Committee of Privy "Council as a final tribunal of appeal in matters of doctrine and "ritual, is not to be regarded as an essential part or necessary "historical consequence of the Reformation Settlement." These conclusions were not formally endorsed by the Commissioners; but the whole of this so-called "Historical Appendix" is the pleading of an advocate who is anxious to establish a theory, rather than to ascertain and develop the whole truth: and it is an unusual instance of deference to ecclesiastical "authority" that the Commission should have accepted implicitly as "irreformable" the series of historical myths which were put before them in this "Draft "Report."

Canon Stubbs' theory is this: the "Reformation" was merely an anti-*Papal* movement; the Pope had then no appeals in heresy or discipline; the King merely succeeded to the *de facto* then existing powers of the Pope; consequently the King had no appeals in heresy or discipline. Therefore the King's "Delegates" could not try heresy, the King's powers being merely visitatorial, analogous to the *appel comme d'abus;* and all beyond this was due to a claim of "headship," which is undefined, and was laid aside as "uncon-"stitutional" by Elizabeth. From all which he deduces the welcome hypothesis that the Crown is not the source of ecclesiastical jurisdiction, but merely exercises, as from without, a visitatorial

or corrective superintendence over an independent set of courts, the judicial authority in which "proceeds from and resides in" the Bishops. It is to give effect to this theory that the recommendations of the Royal Commissioners were framed, and in the presence of so great a danger it behoves us to examine in detail the theory itself.

CHAPTER II.

Spiritual Jurisdiction.

Before however plunging into the intricate detail of the "His-" torical" Appendix, it is necessary to appreciate the root fallacy which underlies the whole Report. Canon Stubbs had urged upon the Commissioners "the extreme importance of . . . . careful "limitation of the terms used." (p. 22.) Yet neither his "Draft" nor the Report pays the slightest attention to the fundamental importance of the two words "spiritual" and "jurisdiction" to which their attention had been formally called by a "Memorial" (of which, by request of their secretary, a copy had been sent to each Commissioner in December,* 1881). The Commissioners at their twenty-second meeting refused to print this Memorial, although they had already reprinted from *The Church Times* of June 24, 1881, an Address by the President to the members of the English Church Union of *double the length* of the "Memorial," and this in addition to giving his "evidence." By ignoring all attempt to clear up the meaning of technical terms, it became possible to describe "moral and consensual authority" as working "through volun-" tary obedience and the use of simply spiritual authority," and in the same breath to call it "the jurisdiction of ecclesiastical judica-" ture." (Vol. I., p. 22-i.) Such language is neither "historical" nor accurate. "Voluntary and consensual" obedience depends entirely upon the will of the person who chooses to obey; recognizes no "law" but such as he willingly chooses and consents to acknowledge; it begins *when* he chooses, is changed *as* he chooses, and

* "Memorial of Laymen's Defence Association to the Royal Commissioners on Ecclesiastical Courts," published by Marlborough, 51, Old Bailey, London. Price 4*d*.

ceases *when* he pleases. It has no more to do with "jurisdiction" than has the tossing up of a coin by which two schoolboys agree to determine a dispute.

"'Jurisdiction,' which is a term of the Civil Law, was not adopted "into the Canon Law as applied to Bishops until the 12th century. "'Jurisdiction' was never attributed to Bishops until Emperors and "Kings had conferred on the Bishops a power of exercising, in their own "Courts, an external coercion over the *bodies and goods* of men. Then, "and not before, we meet the term 'spiritual jurisdiction.'"—*Dr. Stephens' Correspondence with the Archbishop of Armagh*, p. 10.

Dr. Littledale in his "Plain Reasons" (Preface, p. xxvi.) cites Dupin for the

"Remarkable fact that during the eight first centuries of the Church, "whenever mention was made of Church authority, these terms "'*jurisdiction*, sovereignty (*majestas*) or *tribunal*' were not employed, "but only that of Ministry of the Chair."

The Church Times, in an editorial answer to correspondents, January 5th, 1883, says:—

"Jurisdiction has nothing to do with Orders. A newly-elected Pope, "even if still a layman, receives at once jurisdiction over the Roman "Church before his ordination or consecration, and the same holds good "of any priest or layman nominated to be Bishop of a Roman diocese, "for he enters at once on all *legal* powers within it. It is thus a mere "creature of human law."

Our English lawyers have always claimed for the Crown exclusive "jurisdiction," *i.e.*, the power (*juris dicendi*) of defining THOSE CORRELATIVE RIGHTS AND OBLIGATIONS WHICH ARE THE CREATIONS OF LAW.

"*Jus* is the scheme of rights subsisting between men in the relations, "*not of all*, but of *civil* society," says Mr. Gladstone, quoting Cicero. "Jus hominum situm est in generis humani societate."—*Royal Supremacy*, p. 26.

This sense of the word, Mr. Gladstone says, was that of Lord Coke, and he adds:—

"Excludes altogether that of the canonists and [is] also a sense which "appears to have been the genuine and legitimate sense of the word in "its first intention. Now, when we are endeavouring to appreciate the "force and scope of the legal doctrine concerning ecclesiastical and

"spiritual jurisdiction, it is plain that we must take the term employed "in the sense of our law, and not in the different and derivative sense in "which it is used by canonists and theologians. But canonists themselves "bear witness to the distinction which I have now pointed out. The "one kind is 'jurisdictio coactiva, *propriè* dicta, principibus data;' the "other is 'jurisdictio *impropriè* dicta ac merè spiritualis, ecclesiæ "ejusque episcopis a Christo data.'"*—*Royal Supremacy*, p. 25, citing Van Espen.

This distinction was clearly perceived by Henry VIII. [*see* Letters of the Spanish Ambassador, under dates February 14 and May 13, 1532. Report, Vol. I., pp. 89, 93.] He pointed out to Bishop Tunstal (p. 36-i.) that "as to spiritual things, meaning by them "sacraments . . forasmuch as they be no worldly nor temporal "things, they have *no* worldly nor temporal head, *but only Christ* "who did institute them, by whose ordinance they be ministered "here by mortal men . . who *for the time* they do that and *in that* "*respect* 'tanquam ministri versantur in his, quæ hominum potestati "non subjiciuntur; in quibus si male versantur sine scandalo, "*Deum ultorem habent;* si cum scandalo, *hominum cognitio et* "*vindicta est.*'"† Hence "all spiritual things by reason whereof "may arise bodily trouble and inquietation be necessarily included "in the prince's power," while the persons, *laws* and acts of priests "be *indeed* all temporal, and concerning this present life only."‡

This was a clear and statesmanlike view, viz., that the "*minister-*"*ing* of the word and sacraments" (Art. 37) as such, was not a matter of "jurisdiction" at all, but was reserved to God and the day of His Judgment; except, and so far as it produced a "scandal," which overt act brought it AS A SCANDAL within the sphere of "juris-"diction."

The utter confusion which results from neglecting this plain

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* "Coercive jurisdiction, properly so-called, given to Princes," and "jurisdiction, "*improperly* so-called and merely spiritual, given by Christ to the Church and its "Bishops."

† "As ministers are employed in things which be not subject to the power of men: "in which, if they act amiss *without* scandal, they have God for an Avenger: if "*with* scandal, the cognizance and punishment belong to man."

‡ It should be noticed that this letter of King Henry is "curiously reticent as to "the exclusion of Papal authority," as Canon Stubbs notes (p. 36-i.); the King "had not formally broken off relations with the Pope;" but his relations *with his own Clergy* were the subject of "Reformation."

distinction was well illustrated by some of the "spiritual" witnesses. Canon Liddon, for instance, cites Bishop Andrewes as saying "*Docendi munus vel dubia legis explicandi, rex non "assumit.*"* (Q. 7390.) Now, at page 380 of "Tortura Torti," to which Canon Liddon refers, it will be found that *Legis* is printed with a capital "L," for which, in correcting the notes, Canon Liddon has unadvisedly substituted a small "l," and thereby concealed from himself the distinction which Bishop Andrewes is careful to make in that very passage between the Divine "Law" and human "jus." The former is not the subject of "jurisdiction;" the latter is; and Bishop Andrewes goes on to assert, as the Royal prerogative, "*Omnibus omnium ordinum jus dicendi: . . . etiam "Abiathar ipsum, si ita meritus, pontificatu abdicandi.*"†

Dr. W. Phillimore similarly confounds "jurisdiction" with power to "bind and loose" (Q. 1353), or "the power to bind "consciences" (Q. 1892); and Canon Jenkins, referring to the same fancy, says (Q. 2906), "when we gave up the Sacrament of Penance "we kept, as it were, the whole framework which had been built "upon it remaining still; although *we had destroyed the foundation*, "we proceeded as if we still had the same jurisdiction remaining "*which was transferred to the Crown* and the civil courts:" whereas, urges Canon Liddon (Q. 7323), "Our Lord Jesus Christ has given "no authority to laymen to rule authoritatively questions of Christian "discipline and doctrine." But doctrine, *as* doctrine, cannot possibly be the subject of "jurisdiction," so as to be "ruled authoritatively" by litigation in "Courts" to be either true or false. As Mr. Body says, "Judicial power resides in the Church's Head" (Q. 3725), which is, of course, quite true in the sense of King Henry, "*Deum "ultorem habent.*"

The Royal Commissioners are themselves guilty of the same confusion: they speak (p. xvii.) of a "jurisdiction" in "disputes "which *did not admit of* or require *legal* decision," yet which was exercised, they tell us, in a "proper Ecclesiastical *Court;*" yet, on the preceding page, they take credit for using "language of definite

* "The king does not assume the office of teaching, nor of explaining doubtful "matters of the law."

† "Of declaring '*jus*' to all men of all orders . . . even of dismissing "Abiathar from the High-Priesthood if he so deserved."

"import!" No wonder that the witnesses lost themselves in such a fog. Mr. Mackonochie says, "I do not think that coercive juris-"diction ought to exist at all in a Christian Church." (Q. 6164.)

Mr. Wood declared that at no time would doctrine have been "tried in the Ecclesiastical *Courts*." (Q. 971.) Mr. B. Compton, on the other hand, is clear that the Bishop's "*forum domesti-*"*cum* is no *forum* at all." (Q. 2719.) Canon Wilkinson expresses the same thought with charming *naïveté*, "My Bishop is very busy; "he has not had the leisure that I have had to study the history and "teaching of the Church, however great and good he may be as a "Bishop. Over the Bishop is the Church with all her long history "of precedents. I have studied them, and taken advice from men "who have studied them even more deeply than myself. . . . *So*, "my lord, while I respect you personally, I do not recognize in "what you have now said spiritual authority." (Q. 1832.) That is an amusing illustration of the distinction between "spiritual "authority" and "jurisdiction:" the former depends evidently upon subjective assent, notwithstanding all its fine professions of abstract deference; while the latter in no way rests upon such assent, but is exercised for the most part "in invitos," the "stubborn and evil-"doers" of the 37th Article.

The other word which the Commissioners omitted to define was the term "spiritual;" yet a good deal of obscurity and glamour is created by the use made of it. If we simply substitute the word "clerical" for it wherever it occurs in the Report we shall not have altered the meaning of the sentence, but we shall often completely shatter its force. The mere selfish professional trades-unionism stands naked and bare when the claim for "spiritual "independence of the Church" is seen to mean in plain English the "clerical independence of the clergy." Before the Reformation, the word "Church" had come to mean "clergy," and in this sense it is used on the very first page of the Report. "Religion" had come to mean monkery; and "Spiritual" naturally fell to the priests. Being thus established in the usage of the day and employed in older statutes it was retained in this narrow and inaccurate meaning in the earlier "Reformation Statutes." But "subsequent Statutes" have recognized that "the Church" means *now* the assembly of the faithful (Art. 23, 37, &c.) and modern

usage assigns to the word "spiritual" its older and natural sense of relating to the Divine or human "*spirit*." Doctrine (and its vehicle, Ritual), and, in a less direct way, Discipline, are "spiritual" matters in *both* senses of the word. But "jurisdiction" has nothing to do with them in the last-mentioned sense. Only spiritual weapons —argument, persuasion, appeals to the reason, conscience, heart, imagination, and to hopes and fears which relate to the unseen, and the future world—these are "*spiritual*," in the true sense of the word; but on that very account are not, and cannot be made subjects of human "jurisdiction," "*Deum ultorem habent*."* In reading the Report, therefore, it is necessary to bear in mind that the only legitimate applicability of the term "spiritual" to *Courts* is in the narrow and obsolescent sense of "clerical." Yet, even so, ambiguity is not got rid of. What is a clerical court? Is it (1) a court dealing with the professional concerns of clergymen (and in a less degree with laymen who are acting in their concerns); or (2) a court presided over *by* a clergyman; or (3) a court deriving its authority *from* clergymen; or (4) a court of the Crown "sanctioned "by Convocation," or by some other clerical organ?

The Commissioners do not seem to have agreed at all as to the true answer. Archbishop Tait put to Canon Stubbs this awkward question (Q. 1103):—"Is it the person who exercises the authority, "or the person from whom the authority proceeds, that constitutes "it spiritual?" To which came this modest reply:—"I should "not like to answer. It is rather out of my line, and it is a "question to which *there is a good deal of theory* attaching." (Compare Vol. I., p. 40, col. ii.) How much "theory" there is may be discerned from the list given in the Index, p. 93. Dr. W. Phillimore, however, is clear that a Spiritual Court means a Court having a clerical Judge. (*See* Qq. 1929, 1892.) As a lay Chancellor himself, and the son and grandson of Official Principals, the following touching confession can only have been wrung from him by the power of conscience. (Q. 1360.) "The true court was a court "where the Bishop sat, with a select number of his clergy, and "that every derogation from that is a derogation from the true "standard, and that a court where an official principal sits is the

* "They have God for their Avenger."

"furthest possible deviation from that standard." Yet in a very instructive passage of arms between him and the Lord Chief Justice (Vol. II., p. 82), Dr. Phillimore is compelled to admit that even a Bishop cannot absolve, except after process in Court, and in accordance with the judgment of a "Judex," who may be a layman. To get over this scandal, this learned civilian invented a distinction between an "Ecclesiastical" and a "Spiritual" Court (Q. 1929), which added still further to the confusion.

On the whole the third "theory" seemed most popular. The fourth was largely favoured until it was pointed out that the first two Canons of 1604 sanctioned the Court of Delegates and the Judicial Committee, and so gave "the sanction of Convocation." (Qq. 3707-11.) The Prolocutor of York Convocation, however, said, "The Canons of 1603 are very little authority. No one "knows exactly what authority they have." (Q. 4530.) (Compare Hope, Q. 6412.)

It may seem strange that a Royal Commission should pronounce upon "Spiritual Courts" without ascertaining or defining what was meant by the term. But they had left themselves in the hands of Canon Stubbs; and Canon Stubbs, as we have seen, felt that "a good deal of theory" is needed to account for the plain historical fact, that Spiritual Courts of every grade have been "created and modified by *Statutes*," have been presided over by laymen, under Royal Commissions, and have suspended and deprived Archbishops, Bishops, and other clergymen, and inflicted upon them the censures and excommunication of "Holy Church." None of the transcendental "theories" would fit these facts, so nothing was left but to use the word "jurisdiction" in a loose sense, sometimes for the mere terrorism of superstition, sometimes for the due administration of "*jus*" in the "*King's* Ecclesiastical "Courts;" while "spiritual" could be used throughout the Report so as to cast upon laymen and their laws the implied censure of being less Divine than canons, constitutions, and other clerical bye-laws.

What feats of deception cannot be played even upon Royal Commissioners when verbal ambiguities are permitted to the sophist? At least let *us* recognize—what the Commissioners failed to recognize—the need of using the same words in the same sense,

and of defining the technicalities upon which we propose to build our theories.

At p. liii. of their Report, the Commissioners have given (incidentally) a very fair definition of "jurisdiction," viz., the "deciding whether impugned opinions or practices conflict with "*authoritative formularies* in such a sense as to require correction or "punishment."

The "authoritative formularies" and the "punishment" are both alike fixed by "jus." For instance, "Heresy" is defined by statute 1 Eliz. c. 1, sec. xx.; Clerical Subscription by 13 Eliz. c. 12; Ritual by 1 Eliz. c. 2, and so on.

The "function" of all judges, whether of diocesan, provincial or other courts is always just this, and nothing either more or less. Whether the judges are lay or clerical does not affect this point; both alike are to declare and apply—*not theology*, but "*jus*." An elementary and almost infantine proposition, but one apparently lost sight of by the Royal Commissioners.

CHAPTER III.

"HISTORY" *versus* THE STATUTE BOOK.

LIST OF STATUTES WHOSE TREATMENT BY THE COMMISSIONERS IS DISCUSSED IN THIS CHAPTER.

5 Richard II, st. 2, c. 5, p. 27.
2 Henry IV, c. 15, p. 28 and p. 46 n.
23 Henry VIII, c. 9, p. 29.
23 Henry VIII, c. 20, p. 30.
24 Henry VIII, c. 12, p. 31.
25 Henry VIII, c. 14, p. 46.
25 Henry VIII, c. 19, p. 37.
25 Henry VIII, c. 20, p. 47.
25 Henry VIII, c. 21, p. 47.
26 Henry VIII, c. 1, p. 47.
27 Henry VIII, c. 20, p. 39.
28 Henry VIII, c. 7, p. 48.
28 Henry VIII, c. 19 (Ireland), p. 25.
31 Henry VIII, c. 14, p. 48.
32 Henry VIII, c. 26, p. 48.
34 & 35 Henry VIII, c. 1, p. 49.
35 Henry VIII, c. 5, p. 49.
37 Henry VIII, c. 17, p. 49.
1 Ed. VI, c. 1, p. 51.
1 Ed. VI, c. 2, pp. 26, 51.
1 Ed. VI, c. 12, p. 52.
2 & 3 Ed. VI, c. 1, p. 52.
2 & 3 Ed. VI, c. 13, p. 39.
2 & 3 Ed. VI, c. 21, p. 53.
2 & 3 Ed. VI, c. 23, p. 39.
3 & 4 Ed. VI, c. 10, p. 53.
3 & 4 Ed. VI, c. 11, p. 53.
5 & 6 Ed. VI, c. 1, p. 54.
1 Eliz. c. 1, p. 58.
1 Eliz. c. 2, p. 26.
2 Eliz. c. 1 (Ireland), p. 27.
13 Eliz. c. 12, p. 60.
29 Car. II, c. 9, p. 40.

WE have next to examine, one by one, the steps of the argument set forth in the Report.

The first assumption is that the Reformation, so far as it concerns this inquiry, was merely an anti-*Papal* movement, and substituted the King for the Pope; but this leaves out of sight many pertinent facts. In the first place, the very "creation

"and modification" of Courts by "Statutes" implied and asserted the control of Parliament. It is not enough to say with the Report (p. xxxv.) that 1 Eliz. c. 2 "recognized and confirmed "the power of the Ordinary." It *conferred* upon the Ordinaries a new jurisdiction. "For their authority" they "shall have "full power and authority *by this Act* to reform, correct, and "punish by censures of the Church," &c., are the words of the statute. Then, as now, the Legislature created the jurisdiction which the Crown exercised by its judges, whether "spiritual" or lay. The essence of "The Reformation," ecclesiastically speaking, lay in this, that it was an uprising of the laity (the "ecclesia" of Scripture) to claim for themselves a voice in Reforms, both doctrinal and disciplinary, the introduction of which was resisted by the clergy. In a Parliament consisting exclusively of Churchmen, there was felt to be nothing unfit in legislating for the Church, which they virtually if not formally represented, although the Convocation claimed to "represent" not only the clergy, but "doctam Eccl. Angl. partem." (Burnet, "Hist. Ref.," I-ii-312.) As legislators, Parliament alone (with the King) could either "create or modify ecclesiastical courts."

"The importance of the new measures," says Mr. Green,* "lay really "in the action of Parliament. They were an explicit announcement that "Church reform was now to be undertaken, not by the clergy, but by "the People at large."

"The partie of the clergie," as King Henry called them,† were indignant at this recovery by the laity of their rightful position. The divorce of Katharine was far from commending itself to the people, yet the detestation of the clergy was so general (as the Spanish Ambassador repeatedly testifies—Report, pp. 79, 81, 89, 90), that bill after bill passed into law, "to the great "rejoicing of lay people, and the great displeasure of spiritual "persons."‡

Nor is it correct to say that the King merely took over such powers as the Pope had acquired. On the contrary, the very first Act named in the Royal Commission (24 Hen. VIII, c. 12),

* "Hist. Eng.," II-148.

† Burnet, "Hist. Ref.," III-ii-209.

‡ Green, "Hist. Eng.," II-149.

was careful to specify not only "such cases where *heretofore* the "King's subjects have *used* to pursue" to Rome, but "all *other* "cases of appeals." (p. 215-ii.) So Elizabeth's Supremacy Act claimed not only such jurisdictions as by any spiritual power "hath "*heretofore* been," but it immediately adds *or may* lawfully be." (1 Eliz. c. i., sec. viii., p. 225-ii.)

But the Commissioners say that "THE STATEMENTS OF THE SEVERAL "STATUTES WHICH DECLARE ALL AUTHORITY OF THE ORDINARIES TO BE "DERIVED FROM THE KING MUST BE TAKEN WITH SUCH LIMITATION AS "LEGAL HISTORY COMPELS US TO MAKE." (p. xxxvi.) Surely such an extravagant claim was never before made. If this were a merely literary inquiry, we should feel that (as Professor Stubbs says) "there is a good deal of theory about it." But for persons who have received the Royal Command to report upon Courts* "AS "created or modified by Statute," to claim the right of substituting their theories of "Legal History" for "the language of "the Statutes" is surely an unprecedented piece of presumption. The change has been made under the pretext that they wish to make their recommendations "consistent with historical con- "tinuity." (p. xvi.) But they ignore the flaw in that "historical "continuity"—the "fault" as geologists might call it—to preserve which, the very terms of the Royal Commission (as explained by Archbishop Tait and the Lord Chancellor of England when the Address to the Crown was voted in the House of Lords) purposely pledged the Government. To enable them to get "*behind*" the Reformation (as *The Church Times* expresses it) the Commissioners claim (p. xvi.) that "the scope of their inquiry is found to include "the whole history." If so, why mention the "Reformation "Statutes" at all? And why specify merely "*subsequent* "Statutes"? Canon Stubbs, it will be remembered, had shown the way by adroitly interpolating the words "or otherwise recog- "nized." (*Supra*, p. 9.) How completely "the language of the "statutes" is at variance with "Legal History" may be seen from the following table:—

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* N.B.—To inquire into Courts "*as* modified" by a statute is not the same thing as to inquire into Courts which *had been* so modified: the former = the "Reformation Settlement," the latter = Stubbs' legal "history." The Commissioners have substituted the latter for the subject named in their Commission.

DATE.	STATUTE.	LANGUAGE.
1532	24 Hen. VIII, c. 12	"The King at sundry *Parliaments* . . . "*made laws* for the conservation of the "pre-eminences of the Imperial Crown "of this realm and of the jurisdiction "*spiritual* of the same." "The know- "ledge of testamentary, &c., causes *by* "*the goodness of the Princes* of this "realm and by the *laws and customs of* "*the same* appertaineth to the spiritual "jurisdiction of this *realm.*"

This language may be illustrated by the King's letter to Bishop Tunstal the previous year: "Some crimes *we remit by our* "*sufferance* to the judges of the clergy. . . . Other crimes *we leave* "*to be ordered by* our clergy, not because we may not intermeddle "with them," &c.: also, by his letter, just after the passing of this Statute, to the Primate, "to whose office it has been and is "appertaining, *by the sufferance of us and our progenitors* . . . to "judge and determine mere spiritual causes within this our realm, "because ye be under us by God's calling and ours the most "principal *minister* of OUR spiritual jurisdiction within this our "realm." [Wilkins, III-764. Collier, Vol. IX-103.]

DATE.	STATUTE.	LANGUAGE.
1534	25 Hen. VIII, c. 19	Canons made "frustrate and of none "effect" by Parliament, and a new Spiritual Court created by Statute.
1534	25 Hen. VIII, c. 21	"Your Grace's realm . . . is free from "subjection to any man's laws, but only "to such as have been devised . . . "within the realm . . . or to such other "as by sufferance of your Grace and "your progenitors, the people of this "your realm have taken at their free "liberty by their own consent . . . as to "the customed and ancient laws of this "realm, *originally* established as laws "of the same, by the said sufferance, "consent, and custom, and *none other-* "*wise.*"

This is well illustrated by Lord Hale's celebrated declaration.

"All the strength that either the Papal or Imperial" [*i.e.*, "civil"] "laws have obtained in this kingdom, is only because they have been "received and admitted." . . . "Their authority is founded merely on "their being admitted and received by us, which *alone* gives them their "authoritative essence, and qualifies their obligation."*

"Which laws," said Hooker,† "being made among us are not by any of "us so taken or interpreted as if they did derive their force from power "which the Prince doth communicate unto Parliament, or unto any other "Court under him, but from power which the *whole body* of the Realm "being *naturally* possessed with hath by free and deliberate assent "derived unto him that ruleth over them."

So little warrant is there for regarding the Reformation as an affair between the King and the Pope.

DATE.	STATUTE.	LANGUAGE.
1534	26 Hen. VIII, c. 1	"By authority of this present Par- "liament the King shall have and enjoy, "annexed and united to the said Im- "perial Crown, all jurisdictions to the "dignity of supreme Head of the same "Church belonging; and visit, reform, "order and amend all heresies which "by *any* manner spiritual authority or "jurisdiction ought *or may lawfully be* "reformed, ordered," &c.‡
1537	28 Hen. VIII, c. 19 (Ireland)	Repeats *verbatim* the language of 25 Hen. VIII, c. 21, above quoted.
1545	37 Hen. VIII, c. 17	"King hath 'full power and authority "'to correct heresies, and to execute "'all manner of jurisdiction, *commonly* "'*called* Ecclesiastical Jurisdiction.' "(sec. 2.) Archbishops, Bishops, &c., "have no manner of jurisdiction eccle- "siastical but by, under, and from your "Royal Majesty."

* Stephens' "Eccl. Stat.," Vol. I., p. 161; *see* also Lord Coke and C. B. Comyns, as cited by Lord Penzance, Report, p. lxv.

† "Eccl. Pol.," B. VIII., p. 428.

‡ The State Paper drawn up at the time to explain this Act says: "The King "hath power to suppress all such extorted powers, as well of the Bishop of Rome "*as of any other* WITHIN *this Realm*, whereby his subjects may be grieved."—*Froude*, II-219. (*See* below, p. 47.)

1547	1 Edw. VI, c. 1	Provides for communion in both kinds "by authority of Parliament, any "ordinance or custom notwithstanding." The Bill was introduced into Parliament *before* Convocation consented (p. 143, and Wake, 592), which it did only "*nemine contradicente*." The Lower House "kept silence in hope of a pos- "sible reaction." (p. 142.) Five Bishops voted against it in the Lords. (*Burnet*, II-i-84.) Convocation was not consulted as to the "Order of Communion," which was drawn up by certain Bishops and learned men after the Act passed, and issued by Royal Proclamation, March, 1548.
1547	1 Edw. VI, c. 2	"All authority of jurisdiction, spiritual "and temporal, is derived and deducted "from the King's Majesty . . . and that "all Courts Ecclesiastical within the said "two realms be kept by no other power "or authority, *either* foreign *or within* "*the realm*, but by the authority of His "Most Excellent Majesty." Upon this Act, *see* below, p. **51**.
1558	1 Eliz. c. 1	"By the authority of Parliament such "jurisdictions spiritual as by *any* spiri- "tual authority hath heretofore been, "*or may lawfully be*, for correction of "errors, heresies, and schisms, shall be "united and annexed to the Crown." Section 20 defines by authority of Parliament what shall and what shall not be 'heresy;' no consent of Convocation, nor of the spiritual Peers was given to this definition.
1559	1 Eliz. c. 2	Section 4 confers upon Archbishops and Bishops "'full power and authority "'by this Act to reform, correct and "'punish by censures of the Church,' "any other provision heretofore suffered "to the contrary notwithstanding." The Act being described as that of the "Lords Temporal and the Commons" *only*.

1560	2 Eliz. c. 1 (Ireland)	"Repeats language of 1 Eliz. c. 1, but "*omits* the 'assent of the Clergie'" as a condition of any *future* Parliamentary definition of "heresy." (Section 17.)

By the Elizabethan Statutes an oath was imposed upon every clergyman "to assist and defend all jurisdictions — *granted* or "belonging—or *united and annexed* to" the Crown. This oath continued to be taken down to the Revolution of 1688.

The "Reformatio Legum" which the Commissioners quote with respect, p. xxxii. (having been drafted by Cranmer, and being the sole outcome of three Statutable Commissions, though never enacted), lays down the doctrine that "omnis jurisdictio* et ecclesiastica et "secularis ab eo tanquam ex uno et eodem fonte derivantur." Richard Cosin, Dean of the Arches, A.D. 1589, published tables showing the "Ecclesiastical Government," in which under "Potestas "Regia" he reckons "Jurisdictiones† quaslibet concernentes juris- "dictionem ecclesiasticam."

Sir John Lambe, Dean of the Arches in A.D. 1636, is cited in the appendix to the Report, p. 190, saying "The King is the Supreme "Governor, from whom the execution of all Ecclesiastical Jurisdic- "tion is *derived unto* Archbishops and Bishops." It appears from the evidence of Sir John Gell, that Manx appeals went *direct* to the Crown at the same date. (Vol. II., p. 333-i.)

Such is the "language of the Statutes," and the interpretation which they received *at the time* from the *Ecclesiastical* and other Judges.

Let us now see the methods adopted by the Commissioners for "limiting" this language by their theory of "legal history."

5 Rich. II, st. 2, c. 5.

(A.D. 1382.)

This, is given (p. 53) as the earliest Statute against "Heresy," *i.e.*, Lollardy. Its "legal history" is most instructive. It had been smuggled through the Upper House in May, and fraudu-

* "All jurisdictions, both ecclesiastical and secular, from him (the King), as from one and the same fountain are derived."

† "Jurisdictions of every kind concerning ecclesiastical jurisdiction."—*Table XI.*, Wekett's Edition, 1729.

lently entered on the Rolls of Parliament. But in October of the same year the "Commons petitioned for the annulling of the "Act as passed without their consent. But this had no effect," says Canon Stubbs. (p. 53.) Yet the same authority had told us that it "was *repealed* in the same year,"* the Commons protesting that it was never their intent to "bind themselves more to the Prelates "than their ancestors had done;"† and this was so far from "having "no effect," that the same authority tell us "all attempts at further "persecution ended for the time. The Clergy had to content them-"selves with the old process of the Spiritual Courts."‡ (*See* Professor Burrows' "Wiclif's Place in History," p. 111, note.) Canon Stubbs' apology for these "burning" Statutes against "the way "which they call heresy," may be seen in Q. 1142, and is supported by Dr. Phillimore in Qq. 1902, 1955, Rev. B. Compton (Q. 2702), where it may be seen to what lengths a passion for "historical "continuity" may carry even a Professor of History. Compare Canon Jenkins. (Q. 2871.)

2 Hen. IV, c. 15.

(A.D. 1400. "*De hæretico comburendo.*" *Report,* Vol. II-47.)

The next "burning" act was forced through Parliament by the clergy during the weakness of the reign of a Usurper. In the Parliament Rolls it is entitled "Petitio Cleri contra Hæreticos."§ The assent only mentions the petition by Bishops and clergy. The Act begins "Item cum domino regi, et ex parte prælatorum et cleri "regni sui Angliæ in præsenti Parlamento sit ostensum," &c.‖ The clause "ac etiam communitates dicti regni,"¶ was added by the priests.**

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* Stubbs' "Constitutional History," Vol. II., 470.

† Burnet, II-ii-50. Foxe "Act and Mon." V-37, 808. Cotton's "Abridgment," p. 285. Parry's "Parliaments and Councils of England" (Murray, 1839), p. 147.

‡ Stubbs's "C. History," III-356.

§ "The Petition of the Clergy against the Heretics."

‖ "Item, since it hath been shown to our Lord the King on the part of the prelates and clergy of his Kingdom of England," &c.

¶ "And also the Commons of the said Kingdom."—*See* Cotton's "Abridgment," p. 409. Strype, "Eccle. Mem.," III-458. Ed. 1721.

** The Bishop was not required to sit "in person" under this Heresy Act, nor under 2 Hen. V, c. 7.

For the interesting circumstances which accompanied the revival of this statute by the murderous statute, 1 & 2 Philip & Mary, c. 6, see Coke's "Institute," IV-17; Strype, "Eccl. Mem.," III-155, 166.

23 Hen. VIII. c. 9.

(*March* 20, 1532. "*Statute of Citations*," p. 209.)

This measure, which emanated from the Commons and was opposed by the Bishops in Parliament ("Hist. App.," I-33-ii.), was a striking instance of Parliament's interference to change and destroy the jurisdiction of the Archbishop's Court, and the procedure of the Diocesan Court, in spite of clerical opposition. Yet the Commissioners fail to note the relevance of these particulars to their Inquiry (p. xxviii.), although Lord Penzance pointed out that "a graver or more distinct interference with the Archbishop's "original jurisdiction could hardly be conceived." (p. lxiv.)

Neither Canon Stubbs, nor the Commissioners, notice that this Statute gave to aggrieved parishioners remedies in the temporal Courts against the Ordinary and against any and every Ecclesiastical Judge in the shape of "double damages and costs." (sec. iii.)

Dr. W. Phillimore, in Q. 1933, completely misrepresented the "language of the statute," which is printed in the Report, p. 209.* The Act speaks of "the Arches, Audience, and other high *Courts* of "the Archbishops," and provides penalties against the "*Immediate* "*Ordinary*," the "*Commissary, Official*," or other "*Judge*," without the slightest reference to Convocation. Yet the learned canonist declared that it related to the Archbishop (not as sitting in Court, but) "in his Synod." Whereas Mr. Valpy had justly insisted on the fact that the "reservation of the Archbishop's jurisdiction, without "reference to Convocation, would seem to show that no such "jurisdiction had been vested in that body." (Report, Vol. II., p. 298, ii.)

A very interesting point was raised by Mr. Blakesley and by Mr.

* The same authority having wrongfully stated (Q. 1232), that "the Common "Law Judges were never referred to" in Whiston's case, though their formal answers to the Crown are on record (Brod. and Fremantle, p. 322), substituted the more accurate statement that he "forgot." (Q. 1953.) Compare Q. 1965.

Valpy, viz., whether under this statute the Archbishop may not *now* act when the Bishop refuses; the powers of 23 Hen. VIII, c. 9, being expressly reserved under the 19th section of (3 and 4 Vic. c. 86) the "Church Discipline Act," 1840. The Commissioners quietly ignored the point; but when Mr. Jeune at the fifty-eighth meeting moved:—

"That the reservation of jurisdiction to the Court of the Province in "case of a Bishop refusing to allow a prosecution, contained in the 19th "section of the Church Discipline Act, 1840, *should be continued.* The "motion not being seconded, *Dropped.*"

Perhaps few readers will have noted the importance of this Minute. "Historical continuity" found no advocates when it gave an appeal from the individual caprice of a Diocesan. Yet the principle of an appeal from the Bishop's veto was sanctioned by this ancient Statute as being more ancient than itself.

23 Hen. VIII c. 20.

(A.D. 1532. *Payment of Annates. Report*, p. 210.)

It is difficult to conjecture why this Act, which does not in any way relate to the "Courts," was printed by the Commissioners, especially since they have thought it right to suppress so many relevant Acts. They fail to notice that this Statute—

1st. Provides penalties against Ordinaries.

2nd. Orders the consecration and installation of Bishops.

3rd. Orders clergy to administer sacraments, &c. "without any scruple "of conscience."

4th. Forbids prelates to "execute" Papal censures or excommunications.

And all this, of course, "by authority of Parliament" alone. Mr. Dibdin (Q. 7438) said that it was passed "at the request of "Convocation." But the evidence shows that the Bishops all voted against it, and opposed it in Parliament. (Compare p. 33-i.; 34-ii.; 89-i.)

The Act, as is well known, was at once a threat, and a bribe to the Pope, to procure his sanction for the iniquitous divorce of Queen Katharine. Hence the King obtained from Parliament the

curious provision of an interval of eighteen months during which he might annul or give effect to the Statute (as seemed best adapted to suborn the Pope). He did not, in fact, issue his Letters Patent until July 9, 1533. Even *after* the passing of the 24 Hen. VIII, c. 12, so late as April 15, 1533, he offered to "revoke all," if the Pope would come to terms. (Report, p. 99.) But to prevent the appeal of Queen Katharine to the Pope, he procured the passing of

24 Hen. VIII, c. 12.

(*April* 7, 1533. *For the restraint of Appeals.*)

Having got the Canterbury Convocation to assent to the principle of the divorce on April 5, thereupon the Bill passed, and Parliament was immediately adjourned, April 7, 1533. It would seem that Henry had contemplated making his servile Convocations to serve as a "Spiritual Court" for the purpose of his divorce. His confidence was not misplaced, for the two Convocations did, in fact, solemnly sanction with all the prestige of "holy Church" three successive adulteries of their crowned "head." Strange to say, there are English Churchmen who point with pride to these disgraceful antecedents in proof that Convocation was a Court of Appeal. This was gravely asserted by Canon Trevor (Vol. II., 378), and the Hon. C. L. Wood (Vol. II., p. 29-i). But Canon Stubbs preferred to follow the "Memorial"* before referred to when he said (Vol. I., 39-i.) that none of these were "in course of law." The Commissioners (of course) follow his lead, pp. xxix., xxxvii.: and he is no doubt quite right when he says "this jurisdiction" (viz., that created by 24 Hen. VIII, c. 12, § 4) "does not appear to have been ever "exercised;" but he overlooked one proof of the fact, viz., that these *quasi* "Courts" sat as Courts of first instance, and *not* on appeal, which alone the Act would have sanctioned. The "legal "history" being full of shame to the English clergy, it might seem strange that this Act should be dwelt upon so fondly by priest-partisans. They call it the "Great Statute of Appeals." Mr. Gladstone revels in its preamble ("Roy. Suprem.," p. 32): the Commis-

* P. 13, n.

sioners (following Stubbs, p. 39) plead that it "is still in force." They forbear to allude to the fact mentioned in the opening of this paper, that every Judge in every one of the Superior Courts concurred in ruling that this Statute (so far as it related to appellate jurisdiction) was "in effect repealed:" indeed the Commissioners themselves (in the very same page xxix., line 13, and in page xxxvii., line 30) admit that it was "superseded" as to sections 3 and 4 by the 25 Hen. VIII, c. 19, passed within a twelvemonth after by the *same* Parliament. The "stammering lips" with which they hesitate between "the language of the statutes" and their theoretical "history" find speech in the following choice sentence:—

"It is to be observed finally that this Act is *not* repealed by the statute "25 Hen. VIII, c. 19; that in all the later repeals and revivals it is "repealed and revived as co-ordinate with that Act; that it is expressly "referred to in that Act as valid; and therefore in all points in which it "is not implicitly *repealed thereby* it is still in force."

This is surely a puzzling sentence which assumes that the Act is not, and yet implicitly is, repealed by another Act, somehow.

The explanation is simple enough. If we turn to the Acts themselves in the Appendix, pp. 213, 217, it will there be seen that the former Act (24 Hen. VIII, c. 12) merely dealt with three classes of "causes:" but the later Act (25 Hen. VIII, c. 19) directed "all manner of appeales of what nature or condicion* soever they "be of, or what cause or matter soever they concerne," to "be "made . . . AS is limited for appeals . . . in causes of matri-"mony, tithes and oblations," by 24 Hen. VIII, c. 12. Now, whatever else may be doubtful, one thing is certain, that the Legislature would not have troubled itself to pass a second Act to transfer other appeals, "any usage, custom or prescription to the "contrary notwithstanding," if it were known (as Canon Stubbs contends, p. 31-i.) that the *only* appeals to Rome were those which had been *already* withdrawn by the *same* Parliament twelve months before. What could be the point of comparison "after *such* "manner, form, and condicion," if no *separate* classes of cases were referred to? Yet this hopelessly-unreasonable theory is the very heart of the Commissioners' "Legal History." They must have

* On the word "condicion" see Stephens' "Notes on Com. Pr.," p. 1401-i.

forgotten that between the passing of the two Acts the breach with the Pope had widened, and, what is of more consequence, that AFTER the passing of 24 Hen. VIII, c. 12, viz. (Mar. 5, 1534) "The "Commons desired Reformation," . . complaining to the King of their treatment in the Spiritual Courts, the "calling them to Courts "*ex officio*, and not knowing their accusers, causing them to *abjure* "or else to *burn* them for pure malice," . . and of the clergy being "judges and parties in their own cause," p. 103-ii.* Now "abjuring" and "burning" clearly related to heresy. Compare p. 87-ii. So early as 1532 the Spanish Ambassador complains that

"The King also wishes Bishops not to have power to lay hands on "persons accused of heresy, saying that it is not their duty to meddle "with bodies, and that they are only doctors of the soul. . . The Bishops "oppose him." (p. 93-i.)

At the opening of this Parliament in January, 1534, according to the statement of the Ambassador, the King took pains to pack the house. (p. 101-i.) On March 27 the Bill of 25 Hen. VIII, c. 19, had passed the Commons (pp. 104-ii. and 34-i.), and on March 30 it received the Royal assent, and the same day Parliament was prorogued. (p. 34-i.) Now, the Spanish Ambassador on that very day mentions that "the King has got the Parliament to pass an "Act that no Bishop or other clergyman shall act as a Judge in a "case of *heresy*, but only those who shall be *deputed on his part*," *i.e.*, Delegates; and the Commissioners themselves point out that 25 Hen. VIII, c. 14 (the only *other* Act to which this might have been supposed to relate), "still left to the Ecclesiastical "Judge" his ancient jurisdiction in heresy. (p. xxxii.) (*See* below, p. 46.)

It is clear that the three classes of causes named in 24 Hen. VIII, c. 12, viz., tithes, divorce, and money payments to the clergy, were all, to use modern language, "temporal." They were so described in the Queen's Bench judgment cited by Mr. Valpy,† and have been transferred, as such, long ago to the "Tem-

* Compare Latimer's appeal that "secular persons of the Council should be "present at his trial" for heresy, p. 85, col. i.

† Report, Vol. II., p. 300, col. ii.

"poral" Courts; yet these, in the jargon of the day, were then called "causes of the law divine and of spiritual learning." The 24 Hen. VIII, c. 12—

"Still allowed an appeal to the Pope in all spiritual suits" [*i.e.*, in the *modern* sense of the word "spiritual"], "and it was framed upon the "principle that, while all temporal matters which were discussed in the "Ecclesiastical Courts should be finally determined by Courts sitting "within the realm, the spiritual jurisdiction which belonged to the Pope "as supreme head of the Western Church should remain unaffected. "Accordingly this statute is confined to causes about wills, to causes "about matrimony and divorce, and to causes about tithes and "oblations."*

Sir Fitzroy Kelly, who represented the Bishop of Exeter in that case, admitted the truth of this, saying, "No doubt every *other* "description of causes in the Court Spiritual might have still gone "to Rome."† Dr. Phillimore (Q. 1211), and Canon Stubbs (Q. 1161), admit that these three classes of suits (which would now be called "temporal," were specifically THE classes contemplated by the term "causes of the law divine and of spiritual "learning," of which, according to the preamble of 24 Hen. VIII, c. 12, none but a "spiritual" person might "judge." But then, what is that Preamble worth? A preamble is, binding upon nobody even when hot from the legislative mint; it contains only such a statement of motives and reasons as it suits the legislators to assign for the enactments which follow it. Canon Stubbs brushes away the Preambles of contemporary Acts as "the false Preambles of "Henry's statutes" (p. 37); but this one, because it speaks in glowing language of the spiritualty,‡ must be claimed as "still in "force." (p. xxix.)

It may enable us to estimate the value of the mutual flatteries of King Henry and his clergy to place side by side a sample of each:—

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* Lord Campbell, in Queen's Bench Judgment, *Gorham* v. *Bishop of Exeter*. It will be noticed that, not being a Canonist, Lord Campbell "deviated into common-"sense" in his use of the words "spiritual" and "temporal."

† Stephens' "Notes on Common Prayer," p. 1390.

‡ The Attorney-General in the Court of Exchequer remarked upon the altered tone of the later statute (25 Hen. VIII, c. 19), that "the Preambles of the two "Acts *contrast* strangely."—*Stephens' Notes on Common Prayer*, p. 1410.

A.D. 1531. *Address of "Sacred Provincial "Synod" to the King.*	A.D. 1533. *Preamble of 24th Hen. VIII, c. 12.*	A.D. 1533. *April* (i.e., *same month as last*). *King Henry to Abp. of Canterbury.*	A.D. 1540. *On Third Divorce being sanctioned by Convocation.*
"Ecclesiam * studiosissimo calamo defendit et æternam gloriam inde promeruit, atque ad cœlos viam aperuit, et ingressum sibi patefecit . . . ecclesiæ et cleri Anglicani singularem protectorem," &c.—*Report*, p. 70.	"English Church hath always been reputed and also found for knowledge, integrity, and sufficiency of numbers sufficient and meet of itself" (*i.e.*, without Pope), to determine "Spiritual" Causes.†	"Great blame has been arrected to the clergy, especially the heads, because they have not hitherto studied and travelled for to put out of doubt . . . to set some direction in the said cause of matrimony," &c.—*Collier*, IX-103.	"Viros esse plurimos tam graves, literatos, honestos, ac pios, quam usquam locorum alibi reperiri possent."‡—*Report*, I-124-ii.

Yet the admirable merits of the clergy did not blind either the King or the Parliament, in 1533, to the fact (mentioned above p. 24) that the "knowledge whereof" (*i.e.*, of the three causes mentioned in the Act), "*by the goodness of Princes* of this Realm, "and by the *laws and customs* of the *same*, appertaineth to the "spiritual jurisdiction of this *Realm*." This formally excluded all idea of an independent jurisdiction. If the preamble of 24 Hen. VIII, c. 12, is good for anything, it proves that "spiritual jurisdic-"tion" was lodged in the clergy solely by "Princes and laws of "the realm." Even the account of the "realm" or "kingdom" as an "empire" and as a "body politic," of which the "spiritualty" was a "part," the jurisdiction used by them being that of the "Realm," and in virtue of their being part of that body politic, viz. (not the Church, but) the "Realm," really proves the same thing, though careless readers might fancy the "Church" there a *separate* body from the State. "Church" in that statute means not the ecclesia (which was then co-terminous with the State), but

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* "He defends the Church with his most diligent pen, and thence hath "thoroughly merited eternal glory, and opened a way to heaven, and made wide the "entrance for himself . . . the singular protector of the English Church and "clergy."

† The toning down of the Preamble of 24 Hen. VIII, c. 12 as originally drafted by Henry VIII (*see* Vol. I., p. 213) is another indication of his desire to conciliate the clergy *prior to* his Divorce.

‡ "Men, very many, as grave, lettered, *honest*, and *pious* as could in any place "elsewhere be found."

the clergy, as "part of the said body politic" (see p. 164, col. ii.). The clergy are there considered not as the officers of a *separate* corporation, but as constituent members and ministers of the King's "Realm." As such, alone, had they anything to do with "juris-"diction."

To sum up therefore, as to 24 Hen. VIII, c. 12. The Preamble never had the force of an Enactment; Canon Stubbs admits (Q. 1165) that it is unreasonable to "read it into" subsequent Acts of Parliament; its recognition of the clergy as constituting "the "Church" has been disallowed by "subsequent Acts;" it recognizes that "spiritual jurisdiction" belongs to the "realm," and is due to "Princes and laws of realm" even when exercised exclusively by spiritual persons: and it provides by authority of Parliament that every Priest who refuses to administer sacraments, &c., on account of excommunications, &c., shall be imprisoned. (Report, p. 215.) So much for the Preamble.

Sections 2 and 3 cut off appeals to Rome in the three *quasi-*"spiritual" causes named, but provide that not only customary but "*all other*" appeals in those causes should lie to the Archbishops' Courts. This portion of the Act still stands, and is the basis of the comparison made in 25 Hen. VIII, c. 19, as a standard for all *other* "spiritual causes."

But the fourth section is "in effect repealed." It forbade any appeal from the Arches; whereas the 25 Hen. VIII, c. 19, gave an appeal from the Arches to the Crown. It also gave an appeal to the *Upper* House (only), of *one* Convocation (only), from the Archbishops' Courts, in suits relating to the King. That provision however, was never once acted upon: it was made to serve the King's lust, and he found a shorter cut to his end, viz., by a trial in the Archbishop's own Court. As Canon Stubbs says, "It does not appear to have "ever been exercised;" the action of Convocation in the three Divorces being, as the Commissioners report, p. xxix., "not in course of law," though technically, of course, all of them "Spiritual" Acts.

"The Great Statute of Appeals" (so-called) was only of permanent importance because it served as a basis for

25 Hen. VIII, c. 19,

Passed March 30, 1534.

("*The Submission of the Clergy, and Restraint of Appeals.*")

The statement of the Commissioners that "in all the later "repeals and revivals, 24 Hen. VIII, c. 12 is repealed and revived "as co-ordinate with that Act," and "is expressly referred to in that "Act as valid" (p. xxix.), is only true in the very limited sense that its *procedure* was adopted and extended by the latter Act, by which it was superseded. "*All*" appeals were, after Easter, 1534, to be "after *such* manner . . *as* is limited" in 24 Hen. VIII, c. 12, for the three appeals there specified: and the latter were to be no longer finally decided in the Court of the Archbishop,* but (by Section 4) might thenceforth go, like the rest, to the Crown.

There was absolutely no limit either as to the nature of the cause appealed in, or as to the qualification of the Judges. The latter were simply required to be the King's "Delegates" in Chancery. This is expressly admitted by the Commissioners, p. xli. The Act 25 Hen. VIII, c. 19, consists of two parts which have a separate history. The first three sections relate to the *Laws* of the Ecclesiastical Courts; the fourth, fifth, and sixth, to Appeals; while the final proviso, we learn, was added by the House of Lords.

The first part was founded upon the Submission of the Clergy which the King forced upon Convocation in words formulated by himself. (p. 92-i.) It provided that no canons should in future be made without the King's assent beforehand and his ratification afterwards. Next, that since the existing "constitutions provincial" were "overmuch onerous to the King's subjects," they should be weeded by a Commission half-lay in composition; finally that the King's assent must be given to the residue. This latter provision was strengthened in the Act by the words "so that the King's most "Royal assent *under his Great Seal* be *first* had to the same." No

* Because, though tithes and oblations had been specially dealt with in April, 1533, by 24 Hen. VIII, c. 12, the Commons still complained (March, 1534) of the Clergy as "taking tithes and offerings *contrary to justice*, and being judges "and parties in their own cause."

such assent under the Great Seal was ever given. "One direct result "of the measure was that the study of Canon law almost imme- "diately fell into desuetude, and the Universities were forbidden to "confer degrees in that faculty." (Report, p. xxvii.) "In one point, "the employment of lay Judges, the Canon law was distinctly "repealed" (Report, p. xxxii.); and this repeal is expressly attributed by 37 Hen. VIII, c. 17, to this very statute of 25 Hen. VIII, c. 19. The only legal vitality preserved to the old Canon law was by the final proviso that the then existing canons which were not obnoxious "shall now be still used and executed AS THEY WERE "AFORE THE MAKING of this Act till such time as they be viewed," &c., by the aforesaid Commission. Here two things must be noted. First, the Canon law never had any authority of *Parliament* "*before* the passing of this Act," consequently it had no *such* authority after it, by the Act. Second, that "*till* such time as "they be viewed" is not equivalent to "in default of such review;" therefore this revision of the canons having become impossible by the death of Henry, the clauses which were to operate only *until* that event, became a dead letter. As in the law of real property, "if an estate be limited to a man and his heirs *until* (A) shall "attain the age of twenty-one, the estate will determine if (A) "should die under that age."* As Lord Denman observed in the Queen's Bench judgment in Bishop Hampden's case, "the Canon "law is not part of the law of England, unless it is made so by "authority of Parliament here, or by ancient and uninterrupted "use and acknowledgment. The burden of proving that a "particular part of that law is the law of England *rests with those* "*who assert* it to be so."†

Now the Commissioners in their summary on p. xxvii. leave out the important words "under the Great Seal" from the Royal sanction, and "as they were *afore* the making of this Act" from the recognition of existing canons. This enables "legal history" to supplant "the language of the statutes," and to claim (p. 38-ii.)

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* "Preston on Estates," p. 55. Cited by Mr. B. Shaw in *Contemporary Review*, Vol. I., p. 19. The argument is stated at length by Dr. A. J. Stephens in the "Second Report of the Ritual Commission," p. 342.

† "Case of Dr. Hampden," p. 211. (Bell and Daldy.)

that the ancient canons subsist as law "without provision made for "the previous authorization by the King" under s. 7.

The Report says (p. xxxvi.) :—

"The King's Ecclesiastical Laws not less than (!) the Canon law, were "administered by the Ecclesiastical Courts. Both were, where they did "not conflict, of *equal* validity, and, where they did conflict, the Statute "law over-ruled the Canon." *

Why? If the jurisdiction were independent, as the Commissioners assert, why should the Spiritual Court ignore its own Canons, seeing that they were of "equal" validity? In the "Hist. App." it is explained (p. 45, col. i.) that the phrase "King's Ecclesiastical "Laws" meant merely statutes and Royal injunctions in contradistinction to canons. This is called "Legal History;" but the "language of the Statutes" needs a good deal of "limiting" before it can be made to fit.

Language of the Statutes as to the "King's Ecclesiastical Laws."

A.D. 1535. 27 *Hen. VIII, c.* 20. Parson may convent "by due "process of the King's Ecclesiastical Laws of the *Church* of England." "According to the said Ecclesiastical Laws AND Statutes of the "*Realm*." (Stephens' "Ecclesiastical Statutes," 195.)

A.D. 1548. 2 *and* 3 *Ed. VI, c.* 1, *sec.* 12. "Excommunication and "other censures by the King's Ecclesiastical Laws." (Report, p. 222.)

A.D. 1548. 2 *and* 3 *Ed. VI, c.* 13, *sec.* 13. In "King's Ecclesiastical "Court" the "King's Ecclesiastical Judge" decides "according to the "King's Ecclesiastical Laws."

A.D. 1548. 2 *and* 3 *Ed. VI, c.* 23. "Brings back the state of the law "to the state and order of the King's Ecclesiastical Laws" prior to A.D. 1540. (Report, 41-ii.)

A.D. 1558. 1 *Eliz., c.* 2, *sec.* xi. "Ordinaries . . . in their Visitation "Synods to punish by excommunication, censures, heretofore &c., as "hath been used in like cases by the Queen's Ecclesiastical Laws." (p. 231.)

A.D. 1590. The Judges having been consulted in Caudrey's case, "it "was resolved . . . albeit the Kings of England derived their Ecclesias-"tical Laws *from others*, yet so many as were proved, approved, and "allowed here, by and with a *general* consent, are aptly and rightly "called the *King's Ecclesiastical Laws of England*, which whosoever

* Contrast the statement of Blackstone :—"It appears beyond a doubt that the "Civil and Canon laws, though admitted in some cases *by custom* in some courts, "are only subordinate, and *leges sub graviore lege*." (Introd., sec. 3.)

"shall deny, he denieth that the King hath full and plenary power "to deliver justice to all his subjects." (Report, p. 164.) (Compare 25 Hen. VIII, c. 21; cited above, p. 24.)

A.D. 1624. Lord Coke, speaking of "practices reputed Popish," said "the not observing the King's Ecclesiastical Laws was a matter for "our consideration." (Report, p. 151.)

A.D. 1676. 29 *Car. II, c.* 9. Abolishing "De Hæretico comburendo." "Nothing in this Act shall abridge jurisdiction of Protestant Archbishops," &c., but they may punish "according to His Majesty's Ecclesiastical "Laws, by excommunication, censures, &c." (Stephens' "Ecclesiastical Statutes," 623.)

The instances given (p. 46) of the removal of Chancellors by the Crown, and the quotations by Lord Penzance from Lord Coke and Chief Baron Comyns (p. lxv.), further illustrate the principle that the "Reformation Statutes" and all "subsequent "statutes" alike regard *all* "spiritual jurisdiction" as inherent in, or "granted" to and "annexed and united" to the Crown, by the "authority of Parliament." This cuts at the *root* all theories of an "independent" jurisdiction whether in the foreign or domestic priests. "Historic continuity" is therefore illegal if it goes behind this transfer, and is purely antiquarian in its interest.

Before leaving this first part of 25 Hen. VIII, c. 19, we may notice an illustration of Canon Stubbs' method in "legal history." (p. 34.) He is anxious throughout to show that Convocation had a voice in all legislation affecting the Church of England. He urges (in the absence of a single scrap of evidence that the appellate portion of the Act *was* ever submitted to Convocation) that "there is no evidence "that the clauses 4, 5, and 6 were *not* laid before the clergy:" fearing that this might not be deemed conclusive, he adds that the Spanish Ambassador spoke, on March 25, of certain unnamed Acts passed by the Commons as "to-day ratified by the nobles "and clergy." (p. 105.) Feeling that even this might be deemed inconclusive, he continues (p. 104-i.): "The last clause (7) "seems to have been added during the passage of the Bill through "Convocation," *as* the document ends with the usual formula "*soit* "*baille aux communes*" and "*a cette provision les communes sont* "*assentez.*" This is how "legal history" makes itself. The "pro-"vision" in question, we are told by the journal of the Lords, was

per dominos imposita. (Report, p. 106.) Canon Stubbs suppresses the statement of Wilkins *loco citato*, "*a ceste bille, avec une provision* "*annexe*, les Seigneurs *sont assentuz*;" and the statement of Wake, pp. 478-550, that it was "made by the Lords," although (without naming him) he adopts his words, p. 34.

Now it might occur to a student of "legal history" that a provision* made by the Lords on March 28, was unlikely to have been "forced through the Convocation" on March 25; and again that it could hardly be said that "nothing is wanting but the "King's confirmation" (p. 105), unless the "nobles and clergy" who are said to have then ratified it, had been the House of Lords. To make the thing smoother, Canon Stubbs then drops "the nobles" from his quotation (p. 34), and says the Spanish Ambassador spoke "of the clergy" as being employed in this discussion. Yet he is good enough to add that the evidence is "not decisive," the fact being that there is no "evidence" at all† except of the wishes of Canon Stubbs. It is not even certain that the Acts referred to by the Ambassador included the 25 Hen. VIII, c. 19, which he mentions just afterwards as one which he had "forgot to mention" (*vide supra*, p. 33): especially as that Bill did not, in fact, come up from the Commons till March 27th (p. 104-ii.) at which date it did not contain the "provision."

Canon Stubbs says (p. 34), "It is difficult to say on what ground "the opposition could have been based," to a Revision of Canon law by the Royal Commission. If he turns to his own "Appendix IV." (p. 92, 93), he will see where the shoe pinched. "The "Prelates replied that if the King would show them anything "unreasonable in their constitutions, they would amend it *without* "*the interference of Laymen.*" Very much to the point therefore was the petition of the clergy to the King complaining of the legislation of this very Parliament (which passed *both* the "Re-"formation Statutes" mentioned in the Royal Commission of 1881) as—

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* This proviso did not relate to the Court of Appeal, but belonged to the earlier sections of the Act relating to Canon Law.

† It is not known where Wilkins got the "Bill" which he gives "as" from the Register of Convocation, says Mr. Dibdin. ("Church Courts," p. 95.)

"*Enervating the Canonical Sanctions* and incurring manifest peril to the "souls of those who enacted them and of those who executed them, "notoriously and damnably incurring the sentence of excommunication"* by Statutes . . . "to the making of which they (the Clergy) have not con- "sented by themselves nor by their proctors, *nor have they been consulted* "*concerning the same.*"

With what fairness then can it be said (p. 34), "It seems most "probable, on the analogy of the King's other proceedings at this "date, that in some shape or other (!) the consent of the clergy *was* "given to this Statute *as a whole.*"

As to the second part of the Statute 25 Hen. VIII, c. 19, its wide-sweeping language giving to the Delegates "all manner of "appeals of what nature or condition soever they be of, or *what* "*cause or matter soever* they concern . . . any usage, custom, or "prescription to the contrary notwithstanding," is so comprehensive that even the "Draft Report" admits (p. 39-ii.) that it "extends "the *subject-matter* to all matters on which appeals could lie." In copying the context (at p. xxix. of the Report) the Commissioners have eliminated this admission. Why?

They only allow that it extended the "*process*" of 24 Hen. VIII, c. 12, to other subjects. But that is completely inaccurate. No "process" was created by 24 Hen. VIII, save in the matter of the King's causes, and this so far from being extended to any other matter, "does not appear ever to have been exercised" (p. xxix.), being "superseded by the Act of the following year." (p. xxxvii.) The same "process" in ALL matters went on as before the "Re- "formation Statutes," which only provided a new Court of Appeal, and, as we have seen, placed the whole "spiritual" jurisdiction on the foundation of Royal supremacy, *i.e.*, of the national will expressed through its "Supreme Head."

The Commissioners had half-committed themselves to a theory (at pp. xxv. and xli.) that heresy cases were never allowed to be appealed even from the Diocesan Court to the Arches. The Hon. C. L. Wood had "ventured to point out that if there had "been an appeal from the Bishop to the Archbishop's Court

* "Sanctiones canonicas enervantium" . . . "sententiamque excommuni- "cationis notorie et damnabiliter incurrendo." This "cursory observation" is omitted by Canon Stubbs. (p. 92, ii.)

"in regard to strictly spiritual matters, there would also have "been an appeal from the Archbishop's Court to the Roman "Curia" (Q. 836), and Canon Jenkins (Q. 2895) admits that the appeal "ab Archiepiscopo" given in the Reformatio Legum "looks "as if there had been an appeal previous to that." This seems reasonable, since the Report tells us that from the Conquest "the "sentences or authoritative answers to questions delivered by the "Pope" were "laws of the Church of England" (p. xviii.); and again (p. xxv.), that the definitions of Archbishop Courtenay, &c., against Wycliffe were the standards of heresy. For these not merely defined transubstantiation, but made it heresy, and *not mere error*, to say "That if the Pope is under a decree of reprobation, an "ill man, he has no authority over the faithful;" or "that all "Christendom ought to live *independently, like the Greek* Church."* Clearly the burthen of proof lies on those who deny that there was an Appeal to the Pope in Heresy, when trumpery squabbles about elections (Q. 1123) confessedly went to the reputed Head of the Church. A glance at the Index, page **91,** under the head "Was heresy appealed to the Pope?" will show what the evidence was on this point. It is difficult to believe that Canon Stubbs can seriously† suppose that the Pope was not held to be the ultimate referee, when he himself tells us (p. 54) how Wycliffe was tried by "Judges Delegate named in the Pope's bull," A.D. 1377; how, at request of the Archbishop, Bishop Buxton was reserved "until the "Apostolic see should determine about him," A.D. 1384; how Convocation in June, 1425, appointed a Proctor, "pro parte cleri" to appear in the *Court* of Rome against Russell, who had appealed to Rome, and "granted a farthing in the pound for expenses" (p. 63); in the case of Bishop Pecock, 1457, Canon Stubbs tells us ("Const. Hist.," II-317) that "the Pope was requested to deprive "him." This fact for some reason he omits to place in his 'Table, 'p. 68,' although it was brought in evidence by Mr. Droop (Q. 2494). Lastly, how the Papal Legate Wolsey sat in the Province of

* Collier, III-158.

† It is still more difficult to excuse his suppression of the fact brought to his notice in evidence (Q. 2191-2) that by Canon Law the victims were to be burned FIRST, "the appeal being postponed." The absence of appeals is thus sufficiently accounted for. (*See* Index, p. **91.**)

Canterbury, *with the Archbishop of Canterbury for his Assessor*, A.D. 1527, to try Bilney for heresy. (p. 68.)

But after all, it is quite immaterial to the inquiry what was the pre-Reformation use, because, as has been seen (*supra*, pp. **25, 37**), the King's appellate jurisdiction was *not* limited to that formerly usurped by the Pope. So also, at p. **47**, it will be seen that 25 Hen. VIII, c. 14, did *not* render c. 19 inapplicable to heresy. The notion that only matrimonial suits went to the Pope was confidently put forward by the Hon. C. L. Wood, but was repudiated by Canon Stubbs, upon whose authority he professed to rely, but whose language is inconsistent with itself. (Compare Q. 1123 with p. 31-i. of his "Draft Report.")

A more plausible objection was the suggestion that the appeal given by section 4 being "for lack of justice" was merely analogous to the *appel comme d'abus;* but this is refuted by the "language of the "statute," which assigned the Delegates to "definitively determine "every such appeal *with the causes and all the circumstances* "concerning the same;" or, as the parallel Irish Act 28 Hen. VIII, c. vi, expressed it "and in the principal matter and in all the cir- "cumstances and dependents thereupon." (Stephens' "Eccl. Stat.," p. 204).* It was pointed out by Dr. Phillimore (Q. 1374) and by Sir R. Phillimore (Q. 6946) that prohibition rather than appeal is the true analogue of the *appel comme d'abus.*

Lastly, the objection that Heresy did not go to the Delegates, because such cases were taken to the High Commission Court, is urged (p. 47-i.); but it fails in three respects. First, it proves too much, for *all* ecclesiastical courts were similarly interfered with; as Bishop Hacket is quoted (p. 185, note) to prove that the *Diocesan* Courts

> "Became in a manner despicable, because the matters belonging to "every diocese were followed before the High Commission. That it might "be said to the neglected prelates at home, Are ye unworthy to judge the "smallest matters?" (Compare p. xxxiii., line 22.)

Secondly, the absence of the records of heresy cases before the

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* Audley writes to Cromwell, August 14, 1535, and calls the draft of this Bill "the Act for the appeals in *all* spiritual matters." ("State Papers," Hen. VIII, 1830, Vol. I-439.)

Delegates is thus accounted for by Mr. Rothery (whose return is the basis of all our knowledge (p. 188) :—

"Considering the scanty materials from which the earlier periods of "the return have been compiled, the fact that no instance has been "found of an appeal to the Delegates in a doctrinal case prior to the year "1660, *can hardly be taken as a sufficient proof that no such case came* "*before the Court.* . . . The records of the sixteenth century are almost "entirely wanting."

But that does not entitle us to fill them up with imaginary "legal history." One hundred and ninety-three cases in which doctrine and discipline were concerned came before the Delegates between 1568 and 1838, and Canon Stubbs admits that—

"So long as the Court of High Commission existed no case was "likely to reach the Court of Delegates, *even if right of appeal* from the "Archbishop's Court to the Delegates were likely to be recognized." (p. 50-52.)

Thirdly, we have in the case of Lambert (A.D. 1538), before mentioned (p. 9), proof that the King's Delegates did hear appeals in Heresy from the Archbishop's Court when 25 Hen. VIII, c. 19, was recently enacted.

The "legal history" of the High Commission Court is simply that under the Tudor monarchs so many of the Bishops were at first hostile to the Reformation and at a later period were secretly conniving at irregularities, as to necessitate extraordinary "visita-"tion" on the part of the Crown. The High Commission Court being a court of first instance, without appeal, and backed by the Government, its process was swift, and it is not wonderful that the Delegates should for a time have been little heard of, seeing that "more than one third of the whole number of appeals were "discontinued or abandoned," owing to the vexatious delays of that court. (Rothery's Return, p. 183.) The causes of these delays should be studied in Mr. Rothery's Return, because, as will be seen hereafter (p. 63), Canon Stubbs sought to reproduce in the proposed Court of Appeal the dead-lock system which died with the Delegates.

25 Hen. VIII, c. 14

(*March* 30, 1534. *Repealed by* 1 *Edw. VI, c.* 12, A.D. 1547),

which provided for *increased* activity in the burning of Heretics, may hardly seem a "Reformation Statute." Yet it mitigated the iniquity of the older processes which are glossed over under the name of "Canonical Sanctions." (p. 40-ii.) The same phrase was adopted by the Commissioners, p. xxxii., to hide the "inquisitorial "process," as the Royal Commission of 1832 called it. The description there given (p. 202), is expressed in more homely fashion by the complaint of the Commons (p. 103) :—"Calling them "to courts *ex officio* and not knowing their accusers, causing them "to abjure, or else to burn them for pure malice, taking tithes and "offerings contrary to justice, and being judges* and parties in "their own cause." In 1532 the Commons had complained of "subtle examinations in heresy by which men are beguiled into "error and heretical statements." (p. 90.) And this renders it probable that the complaint of the clergy that they were "not "consulted in the making of the statutes" of 25 Hen. VIII related to *this* Bill, since that complaint expressly names the "ener-"vating the canonical sanctions" by Statute. (*See* above, p. 42.) Hence, it is also probable that the twin Bill, 25 Hen. VIII, c. 19, which came up from the Commons, and also was ratified by the King, on the same day with 25 Hen. VIII, c. 14, came under the *same* clerical condemnation. "There is no reference (in 25 Hen. VIII, "c. 14) to the right of appeal or to any right of discretion as to the "issuing of the royal writ 'de hæretico comburendo,'" says Canon Stubbs. (p. 34-i.) The reason is obvious; by the *companion* measure 25 Hen. VIII, c. 19,† these defects had been neutralized by providing

* In 1515, King Henry had told the clergy, "As for your decrees, we are well "assured that you of the Spiritualty. . . interpret your decrees at your pleasure." He refused the appeal to the Pope, urged by the Spiritualty in this case (Dr. Standish's), which they deemed one of Heresy. (Burnet, I-i-34, and Bp. Gardiner's Oration, published by Longmans, p. 20.)

† That these two Acts were regarded as dealing *jointly* with Heresy is probable too from Audley's letter to Cromwell on the proposed extension of them to Ireland: "I have left the Act of Heresy and the Act of the Submission of the "Clergy for this time; for I think it is not necessary for that land; for the Statute "of King Henry IV, in cases of Heresy, was never put in execution in that land, "as I am informed." ("State Papers" of Hen. VIII (1830), Vol. I., p. 441.)

an appeal in *all* causes from the Bishop to the Archbishop and from him to the Delegates. Without this provision, the complaints of the Commons—with whom both measures originated—would not have been met; and if the Commissioners are right in following Canon Stubbs in his strange notion that heresy could not have been appealed before 1534, even into the Arches, from any petty diocesan consistory (*supra*, p. **42**), although it was a question of life and death as well as of theological difficulty—yet, even so, the 25 Hen. VIII, c. 19, should have been gratefully recognized by a "legal "historian" as putting an end to the "historic continuity" of a practice as cruel as it was unreasonable.

25 Hen. VIII, c. 20.

(A.D. 1534. *Annates, p.* 210.)

This Act like the 23 Hen. VIII, c. 20 hardly deserved a place among Statutes to be reprinted by the Commission as bearing on "Courts." It provides that Deans and Chapters shall "elect" under penalty of *præmunire* the person named by the King who, if they fail to do so, is to present by Letters Patent. And a like penalty of *præmunire* against any Archbishop or Bishops who refuse to consecrate.

25 Hen. VIII, c. 21,

before quoted (p. **24**), is ignored by the Commissioners. Sir Thomas Audley, a layman, being the Lord Chancellor, it is provided that an Injunction in Chancery shall issue, if need arise, to compel the Archbishop to grant licences, &c.

26 Hen. VIII, c. 1.

(*November* 17, 1534. *Supremacy Act.*)

This short Act the Commissioners forbear to print; yet they build much upon the supposed contrast between the "Headship" herein claimed and the "Supreme Governorship" of later times. The Act is merely declaratory, and *did not enact** the "Headship" which it

* "The King's Grace hath no new authority given hereby that he is recognized "as supreme head of the Church of England." Contemporary State Paper in Froude, II-219. Mr. Gladstone holds that this Statute is repealed: but the contrary is maintained by Stephens ("Eccl. Stat.," 177), Comyn's "Digest.," Vol. II., D. 17, ed. 1822. Dyer 98, and 4 Inst. 325.

said had been "recognized by the clergy in their Convocations"; but it only "corroborated and confirmed" what already "*rightfully* "*is* and ought to be." It will be remembered that the Court of Delegates and their Appellate Jurisdiction were altogether prior to this Act. The stress laid by "legal historians" on this "headship" is purely verbal, unreal, and misleading. (Compare Green's "Hist. "of England," II-153.)

28 Hen. VIII, c. 7

(A.D. 1536. *Attainder of Anne Boleyn*),

ignores the instrument drawn up by the clergy sanctioning the divorce from Anne Boleyn more than a month after her death. This is regarded by Canon Trevor (Vol. II., p. 378) and the Hon. C. L. Wood (Q. 805 and p. 42) following herein Mr. Joyce,* as a trial under 24 Hen. VIII, c. 12, forgetting the pertinent fact that Queen Anne was beheaded May 19, 1536, and Convocation did not meet till June 9. (p. 112.)

31 Hen. VIII, c. 14.

(A.D. 1539.)

The notorious "Six Articles' Act" rehearses the assent of the "Clergy in their Convocation." No need here of "legal history" to supply that which is lacking. (p. 117.)

32 Hen. VIII, c. 26

(A.D. 1539),

is misrepresented by the Commissioners (p. xxvii.) as "the King "acting with the advice of divines." Mr. Valpy, however, had pointed out (Vol. II., p. 299, col. ii.) that the recital of the Act specifies the King "with the advice of his most honourable "Council and such as His Highness hath appointed or shall from "time to time appoint." This makes it clear that the clerically drafted† formulas had to be submitted to and accepted by the Privy

* In his "Sword and Keys" (p. 133), for which "the thanks of the Com- "missioners were conveyed to Mr. Joyce." (p. 5.)

† Even the Drafting was not necessarily by "Archbishops, Bishops, and Doctors "now appointed," for the Act gave the alternative "*or* other *persons*." So in

Council, or by a Royal Commission before being "decreed." "Legal History," it seems, preferred to ignore this fact. (p. 35-i.)

34 and 35 Hen. VIII, c. 1

(A.D. 1543),

euphemistically described (p. xxxi.) as "an Act for the advance-"ment of true religion," but really directed against Tyndale's translation of the New Testament into English, was "mainly based "upon a resolution of Convocation." (p. 35-i.) It allowed in lieu of the Ordinary and Judge, two of the King's Council. (p. 40.)

35 Hen. VIII, c. 5.

(A.D. 1543. *Amending "Six Articles' Act."*)

Canon Stubbs notices the "presentment by jury" (pp. 40-ii.), but omits to mention that of the two Commissioners appointed by the Act "one of them to be a Lay person."

37 Hen. VIII, c. 17.

(*December* 22, A.D. 1545. *Lay and Married Men to be Spiritual Judges.*)

In 1542 this measure had been thrown out by the Bishops (p. 128), but in 1545 it ran through Parliament in a week. (Report, p. 35.) [Compare Stephens' "Ecclesiastical Statutes," 288.]

Being a short Act and dealing directly and exclusively with the "constitution and working of the Ecclesiastical Courts," it is not printed by the Commissioners. This is the more to be regretted because both the Report (p. xxviii.) and the Draft (p. 39) in citing it, *omit* the words italicized in the following passage :—

"All and singular persons, as well Lay, as those that be married . . . "which shall be made . . . . Chancellor, &c., by Your Majesty . . . "or by any Bishop . . or other person, having authority *under Your* "*Majesty* . . to make any Chancellor," &c.

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the State Paper, quoted by Froude (II-220) it is said, "if any of the doctors of "the Church, or the Clergy have, by any of their laws or decrees, declared any "Scripture to be of that effect, Kings taking to them their Counsellors, *and* such "of their Clergy as they shall think most indifferent, ought to be judges "whether their declarations and laws be made according to the truth of Scripture "*or not.*"

Canon Stubbs admits that it "implies the possession of all "Ecclesiastical jurisdiction, and that *exclusive of any inherent "jurisdiction in the clergy.*" A very important admission when we remember that it is under this Statute that every Chancellorship in the kingdom is now filled. He is not accurate, however, in saying (p. 39-ii.) that the Act speaks of Lay rights in Ecclesiastical jurisdiction being disparaged by "Canon Law *as yet unrevised.*" The Act speaks of that law as "utterly abolished" ten years previously, being as the Commissioners say (p. xxviii.) "abrogated "by the Statute 25 Hen. VIII, c. 19."

Canon Stubbs is very angry with it, declaring its statement of the Supremacy to be "based upon no legislative Act" (although the Act *expressly mentions* 25 Hen. VIII, c. 19, as the basis of the whole enactment), and he denounces it as one of "the false preambles of "Henry's Statutes," of which "the Great Statute of Appeals" was one. (p. 37-i.) Similarly, he asserts (p. 40-i.) that the interpretation of 37 Hen. VIII, c. 17, by the Judges in *Walker* v. *Lamb* was "*grounded upon* an extreme view of the Supreme Headship"; whereas the Headship is not so much as once referred to in that Judgment. (Croke's Report, Car. 258.)

The preamble which offends him says:—

"The Bishop of Rome and his *adherents*—in their councils and *synods* "*provincial*, have made *constitutions* that no lay or married man might "exercise any Jurisdiction Ecclesiastical—lest their false and usurped "power, which they pretended and went about to have in Christ's Church "should decay" . . . "which constitutions provincial . . . standing and "remaining *in their effect*, not abolished by Your Grace's laws, did sound "to appear to make greatly" for the Pope. Sec. 2 continues, "and albeit "the said decrees, ordinances and constitutions *by a Statute made in the* "*twenty-fifth year* of your noble reign *BE* utterly abolished, frustrate, "and of none effect; yet because the contrary thereunto is *not used nor* "*put in practice by* the Archbishops, Bishops, Archdeacons, and other "ecclesiastical persons who have no manner of jurisdiction ecclesiastical "but by under and from your Royal Majesty" . . . .

it enacts that lay and married men may exercise Ecclesiastical Jurisdictions, "and all censures and coercions appertaining unto "the same." Considering the importance attached by the Commissioners to the "personal" Judgeship of Bishops, their suppression

of this Act which is in *viridi observantiâ** (while they take up space with an Act relating to Primitive Methodists (p. 240), and matter relating to other private societies) marks their motive rather than pertains to their ostensible purpose.

1 Ed. VI, c. 1

(*December 20th*, 1547. *Communion in both kinds*),

revived by 1 Eliz. c. 1, allowed Bishops to advise the Justices of Quarter Session who, with a Jury, took cognizance of the offences against this Act. Canon Stubbs forbears to note that this was a recurrence to the principle of Anglo-Saxon times. (*See* Q. 4338.) Compare Lord Hardwick's account of the true function of Convocation, as advising the Legislature rather than legislating. (p. 167.) Convocation "accepted the principle of communion in both kinds" (p. 41), but it was "*during* the progress of the Bill through the "Lords." (p. 143.) The Lower House of Convocation, says Canon Stubbs (p. 142), largely "consisted of men who were indisposed to "the new policy, and kept silence in hopes of a possible reaction." Five Bishops voted against the Bill in the Lords.

1 Ed. VI, c. 2.

(*December 20th*, 1547.)

This Act stands in a position in "legal history" curiously parallel to that of "the Great Statute of Appeals." Both were repealed under Mary; both were revived (viz., by 1 Eliz. c. 1, and 1 Jas. I, c. 25, s. 8, respectively); both were "in effect repealed" and "superseded," as to the main purpose of their original enactment.† (*See* above, p. **32**; Collier, V-231.) Yet the difference of treatment which they receive at the hands of the Commissioners is curious;

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* This Act, which was merely declaratory of the old law, was repealed by the "Statute Law Revision Act, 1863," but subject to a proviso that this repeal "shall not affect any principle or rule of law or equity or established jurisdiction ". . in any manner affirmed, recognised or derived by, in, or from any enact- "ment hereby repealed."

† 1 Ed. VI, c. 2, anticipated the legislation recommended by the Royal Commission of 1832, as to "probates of testaments, administrations, and inventory." It was not finally repealed till 1863, by the Statute Law Revision Act.

the reason is found in the language of their respective preambles. (*Supra*, p. 26 and 35.)

1 Ed. VI, c. 12

(*December 24th*, 1547. *Repealing Heresy Acts*),

was opposed by five Bishops. (Burnet, "Hist. Ref.," II-i-81.)

Canon Stubbs says Convocation "discussed the repeal of the 'Six "Articles' Act.'" (p. 41.) He does not report the result of the discussion; but Mr. Dibdin says "it does not appear that the "repeal was expressly sanctioned by Convocation." ("Church Courts," p. 23.)

2 and 3 Ed. VI, c. 1

(*January 22nd*, 1549. *First Prayer Book*),

recites that the King had appointed a Royal Commission of Bishops and other learned men (who met at Windsor, not at Lambeth), but the Act is silent as to any sanction from Convocation.* "Foxe, who published in Elizabeth's reign, and Fuller and Heylin,† "who wrote under the Commonwealth," says Mr. Droop, "all "agree in saying that this Prayer Book was drawn up by certain "Bishops and learned men *appointed by the King*, and enacted by "Parliament. The records of the Canterbury Convocation were "then extant, and *both Fuller and Heylin examined them.* It was "only after the destruction of the records of Convocation in 1666 "that Atterbury appealed to the passage quoted from Wilkins IV-"35, as proving that the Convocations were consulted about the "Prayer Book." Atterbury's more trustworthy contemporary, Archbishop Wake ("State of the Church," p. 495), is silent on the point. The original Commission had to be cut down to less than half, before the book could be got through Committee;‡ and

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* It will be seen from Cardwell's "Synodalia" (p. 421), to be very doubtful whether the Henrician revision of the service book which the Lower House of Convocation asked to see (p. 143), *was* the first Book of Edward.

† Heylin, "Hist. Ref.," I-139; "Life of Laud," p. 307; "Historical Tracts," p. 38. Ed. 1681.

‡ "Book of Common Prayer Illustrated," by W. Keatinge Clay, p. 190 (note).

even then, five of its so-called "Compilers" disliked it; indeed, Bishops Day, Skip, and Thirlby, were among the eight Bishops who voted against it in the Lords. It was utterly rejected by Bonner, on the one hand (Collier, V-342), and by Hooper on the other ("Original Letters," p. 79), and rebellions in Devon, Norfolk, and Oxfordshire attest its unpopularity. The Act gave the Bishop the same power of advising the Justices of Assize as noted before under 1 Ed. VI, c. 1. (*See* also *supra*, p. 39.)

2 and 3 Ed. VI, c. 21.

(A.D. 1549.)

Marriage of Priests. Nine Bishops voted against it (Burnet, "Hist. Ref.," II-i-183; Collier, V-304).

3 and 4 Ed. VI, c. 10

(A.D. 1550),

opposed by six Bishops (Burnet, "Hist. Ref.," II-i-294), abolished ancient office books and images (*i.e.*, Church "Ornaments") lest they should be a hindrance to the Prayer Book "of late set forth "by authority of Parliament." Offences tried before Justices. (Raithby's "Statutes at Large," II-294.)

3 and 4 Ed. VI, c. 11.

(A.D. 1550. *Report*, p. xxxii.)

Revision of Canons. Ten Bishops voted against it; and Collier (V-373), supposes it was because there were only two Bishops among the thirty-two Commissioners. Canon Stubbs omits to note that the Royal Warrant under the Great Seal was required to give them validity. (Compare *supra*, p. 37, and Burnet, "Hist. Ref.," II-i-291.)

Canon Stubbs says (p. 42): The Bishops complained that "by "the use of public proclamations" their jurisdiction had fallen into contempt. He gives no authority for this statement, and it is difficult to see what "proclamations" had to do with it. Burnet's account is that Parliament was unwilling "to give the Bishops any "power while the rules of their Courts were so little determined or

"regulated." The danger of *præmunire* hung still over any who attempted to put in use Canons whose authority (like that of the Canons referred to above (p. 49) forbidding lay or married men to judge Ecclesiastical causes) had been undermined by 25 Hen. VIII, c. 19. Hence, Mary (March 4th, 1554), before the repeal of 25 Hen. VIII, c. 19, urged "all having Ecclesiastical jurisdiction "to boldly proceed* without fear of *danger to be incurred of any such* "*our laws* as might anywise grieve you, whatsoever be threatened "in any such case." (Card., "Doc. Ann.," I-111.) Hence, too, the Edwardine clergy had petitioned "so that all Judges Ecclesiastical, "proceeding after those laws, may be without danger and peril." (Card., "Synod.," II-420.) This explains the solicitude of the clergy for a revision of the Canons which should be *authorized.* The revision for which they petitioned was one "according to the "*Statute.*" (*See* p. 132.) The Draft omits to note this. (p. 35-i.) It was not so much reform, as *power* which was the object of this series of petitions. Nor was it merely that the "Lords thought "the pretensions of the Bishops too great." (p. 42-ii.) But as the Lords themselves said, that—

"The greatest part of the Bishops and clergy were still Papists at "heart; so that if power were put into such men's hands, they would "employ it against those who favoured the Reformation." (Burnet, II-i-198.)

This is confirmed by King Edward's journal (in the *very next sentence to the one quoted* by Canon Stubbs, p. 42) :—

"Because those Bishops who should execute it, some for papistry, some "for ignorance, some for age, some for their ill name, some for all these, 'are men unable to execute discipline."†

This explains the meaning of "those that be of the best sort." (p. 42-ii.)

5 and 6 Ed. VI, c. 1.

(*April 14th*, 1552. *Second Prayer Book.*)

Canon Stubbs, by quoting (pp. 41-43) the sessions of the same Parliament as the "first, second, and third Parliaments" of Edward

* The following week, Cranmer, Ridley and Latimer were sent from the Tower to defend their "heresies" at Oxford. (Sanders' "Anglican Schism," p. 363.)

† Burnet, "Hist. Ref.," II-ii-102.

conceals the fact that the *second* Parliament did not begin till March 1st, 1553. (Wriothesley's Chronicle, II-81, and Burnet, II-i-441.) Thus the "legal history" of the two Prayer Books of Edward (which he affects to discuss, p. 143) is concealed. The very *same* Parliament which enacted the "first" book enacted the "second;" the very same Divines* who formed the majority of eight to five in the Royal Commission for compiling the "first" book, also made the "second." The very same Parliament who described their own handiwork as done "by the aid of the Holy Ghost," claimed by this second "Act" of theirs to have "explained it and made it *fully perfect.*" (p. 223-ii.) Now this, which is but one link in a chain of evidence that the First Prayer Book was a "compromise which satisfied nobody"† and was never intended to be more than temporary, while the Second Book represents the matured judgment of our own native Reformers who only accepted the former book (as an instalment of what was desirable) till they could get rid of their Romish colleagues—this interesting fact ought not to have been suppressed by a compiler and professor of the "history" of the period. On April 26th, 1549, nearly two months before the first Prayer Book came into use, Bucer writes that the compilers of that book informed him that its rites were "only to be retained *for a time*, "lest the people, not having yet learned Christ, should be deterred "by too extensive innovations." ("Original Letters," ii-535.) Roger Hutchinson says of reception of the wafer into the mouth (which was prescribed by the first book), "So the king commandeth. . . . . "*for a time and season* . . . . until thou shalt have have more know-"ledge. . . . intending, as I take it, to make an uniform law to the "contrary." (Works, p. 232.) The Rev. T. W. Perry says: "The "changes appear to have been determined upon *before* Bucer's "censures reached Archbishop Cranmer." ("Notes on Purchas "Judgment," p. 271.) Hardwick, Proctor, and Scudamore ("Notit. Euch.," p. 737) hold the same view. But the evidence

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* Cox (who was one of them) writes, October, 1552:—"We have now for the "second time altered the administration of the public prayers, and even of the "Sacraments themselves, and have framed them according to the rule of God's "Word."—*Orig. Letters*, p. 123.

† Rev. H. B. Walton's "Letter to Rev. T. T. Carter." 2nd Edition, p. 51. Not a single copy of the First Prayer Book was printed after 1549, when the book was first issued.

tendered to the Royal Commissioners by some of the "spiritual" experts respecting the Prayer Book, throws light upon the meaning of Canon Stubbs' obscure phrase, "Judges who have spiritual "authority and *theological competence.*" (*Supra*, p. 11.) The Rev. J. Oakley (since made Dean of Carlisle and of Manchester) said of the "Second Prayer Book" (Q. 2447), that King Edward "DIED "BEFORE THE DATE FIXED FOR ITS ADOPTION, AND THE BOOK REALLY "DIED WITH HIM."

The King died July 6th, 1553, and the Book came into use November 1st,* 1552. Its use was far more general than that of the "first" book had ever been. Mr. Welby Pugin says "it was "used by the great majority of the old priests." ("Church and State," p. 20.) Eight separate editions (besides several separate impressions of each) and a French translation are known to have been issued. (Parker's Introduction, p. 30-5, and 509.) So far from "dying "with the King," it was found that even in Mary's packed House of Commons, one-third were favourable to its retention; it was used exclusively by the English exiles abroad; and it lingered in actual use even in England so late as 1555. (Green's "History of England," II-246, 293.) "Did not many in the University, and abroad in the "realm, use this Service openly and commonly in their churches, "afore it was received or enacted by Parliament" asks Bishop Pilkington in the next reign. (Works, p. 626.) Cox and May, two of the compilers of the "first" Prayer Book, were among the "divines" who then preferred the adoption of the *second* book, which was accordingly enacted by 1 Eliz. c. 2. But even earlier than that, "on March 17, a Bill† was brought in that "no person should be punished for exercising the religion used in "King Edward's LAST year," read twice and ordered to be engrossed. (Strype's "Annals," I-97.) In 1662 the preference of the nation for the second book of Edward was again manifested. The House of Commons sought to re-enact "the original" of Edward's *second* book, and only fell back upon a book of 1604, after failing to discover the "original" book of 1552. (Swainson's "History of the

* "This day all copes and vestments are put down through all England."—*Wriothesley's Chronicle*, II.-78. (Compare Strype's "Cranmer," Book II., chap. xxiii.)

† This Bill was prior to that of 1 Eliz. c. 2, which was introduced April 18th. —*Swainson's Historical Inquiry*, p. 9.

"Act of Uniformity," p. 11.) So far from "dying with the King," the book of 1552 is historically and legally identified with the present Prayer Book, so that the "Conference held at All Saints', "Margaret Street, on Ritual Conformity," complain *now* of the need of "revoking the alterations made at the revision of 1552." (p. 37, Edition 1882.) The Rev. J. Oakley was not alone in his teaching of "History." Dean Cowie (Prolocutor of York Convocation, and now Dean of Exeter) told the Commissioners (Q. 4497) that "the Act of Uniformity was submitted to Con- "vocation before it was agreed to by Parliament;" and "thought" the 25 Hen. VIII, c. 19 (which appointed the King in Chancery as the Court of Appeal) "said the spiritualty." (Q. 4527.) When Archbishop Tait suggested to him that he was muddling up two separate Acts, the Dean replied (Q. 4528): "I am not "acquainted with that," viz., with the two Acts specifically named as the basis of the inquiry in the Royal Commission. Again, Canon Wilkinson (since made Bishop of Truro) "always understood" that the Reformation Statutes were "submitted to Convocation." (Q. 1840.) And the Rev. Malcolm McColl ingeniously suggested that the Advertisements described in the 24th canon as "published "anno 7 Eliz.," may have been the Royal Injunctions of 1559. (Q. 6552-6.) Such is the spiritual wisdom * to be gained by listening to persons who *have* "Theological Competence."

Each of these Acts of Uniformity authorizes the Bishops to "ex- "communicate" and inflict "censures of the Church" by "authority "of Parliament." The Commissioners most unjustly describe "the "total destruction of discipline which *marked the policy* of Edward" (p. xxxiv.); forgetting that Canon Stubbs had spoken of "the "measures for the reform of discipline *contemplated by* the King" (p. 43); forgetting that the Statute book shows (like the King's diary) his active solicitude; and that "discipline" was, in fact, more vigorous than in the reign of Victoria, though thanks to the long reign of Popery, the morals of the people and the learning of the clergy were immeasurably lower. The Historical Appendix enumerates the *repealed* Statutes of Edward (p. 43), but omits to point out how many were *revived*. The following is the list:—

* "A *supernatural* wisdom for deliberation" is "developed from the Gift "of Ordination."—*Rev. J. H. Blunt*, Dublin Congress Report, 266.

1 Ed. VI, c. 1, revived by 1 Eliz. c. 1.

1 Ed. VI, c. 2, „ „ 1 Jas. I, c. 25.

2 and 3 Ed. VI, c. 1. The "Authority of Parliament" referred to in the Ornaments' Rubric. This Act was never revived.

2 and 3 Ed. VI, c. 21, revived by 1 Jas. I, c. 25.

3 and 4 Ed. VI, c. 10, revived by 1 Jas. I, c. 25.

3 and 4 Ed. VI, c. 12, Ordinal of 1550, expired in 1552.

5 and 6 Ed. VI, c. 1, the Prayer Book annexed to this Act was expressly re-enacted by 1 Eliz. c. 2 which is still PART OF the Prayer Book of 1662, being printed in the "Sealed Books" and numbered in the "Table "of contents," though often now omitted illegally by printers.

5 and 6 Ed. VI, c. 3, abolishing black letter days, revived by 1 Jas. I, c. 25; even under Elizabeth it had been recognized as the standard of observance by the Advertisements of 1566.

5 and 6 Ed. VI, c. 12, revived by 1 Jas. I, c. 25, sec. 50.

1 Eliz. c. 1.

(*March 18th*, 1559, p. 224.)

"*Restoring to the Crown the ancient jurisdiction over the estate spiritual.*"

Here we reach the "ultimate settlement," as the Commissioners call it. (p. xxxii.)

"The Statutes passed in her first Parliament are remarkable for their "comprehensive, as well as their permanent character, embracing the "whole subject of the Ecclesiastical Constitution, and remaining in all "but one important matter, practically in force until the present "century." (p. xxxiv.)

Now, how do the Commissioners deal with this "language of the "statute?"

First, they represent (p. xxxv.) the standard of Heresy (imposed by lay authority) in Section 20, as being "Holy Scripture, or the "first four General Councils, or by other General Councils on the "authority of Scripture." In this they follow Canon Stubbs. (p. 44-ii.) But the "language of the Statute" is quite different; it specifies "such as *heretofore have been* adjudged" by the two first-named authorities; while the third is restricted to those matters "wherein "the same *was* declared heresy by the EXPRESS AND PLAIN WORDS of" Scripture.* This alteration is not unimportant when we remember

* "The words are negative. They do not require that everything which "fulfils these conditions should be reputed heresy: but that nothing which

that "General Councils have erred in things pertaining unto God" (Art. xxi.); and when we notice in the Analytical Index, pp. 89-98, the notions of Canon Liddon (Q. 7380), and of Rev. B. Compton (Q. 2776) who proposes to go "outside the formularies," which "are "altogether insufficient to determine a question of doctrine;" preferring the "common law of the Church" to enforce *ex. gr.* "the mixed Chalice." (Qq. 2775-2784.)

Evidently the Commissioners (p. xxxv.), here, following Canon Stubbs (p. 44), cannot bring themselves to quote the "language "of the statute." (*See* Sec. 8, p. 225.) Canon Stubbs substitutes "&c. &c." for the obnoxious words which the Commissioners simply omit; indeed so painfully "Erastian" is the language of the first Commission issued by Elizabeth, that Canon Stubbs imperfectly quotes both it and "the exact words of the statute," which he professes to give. (p. 49.) Both those documents, *locis citatis*, speak of "heresies, errors, and enormities spiritual and ecclesiastical." Still stronger is the language of the Commission to the Royal Visitors, June 24, 1559 (also omitted), which authorized the thirteen laymen and one clergyman therein-named to punish by "ecclesiastical censures, deprivation, sequestration," &c. (Card., "Doc. An.," I-219.) Mr. Gladstone ("Roy. Suprem.," p. 15, n.) justly says that "the words of 26 Hen. VIII, c. 1, are certainly *not* larger" than those of 1 Eliz. c. 1. (*See* above p. 26, 27, and note there the 2 Eliz. c. 1, Ireland.) King Henry had carefully explained the limited sense in which alone he claimed to be head of the clergy, who were then styled the "Church." (*See* p. 35 of the Draft.) King Edward had used almost the very words of the *Reformatio Legum* in the Commissions made out to Cranmer and Bonner,—

"Omnis juris dicendi auctoritas atque etiam jurisdictio omnimoda, tam "illa quæ ecclesiastica dicitur, quam secularis, a regiâ potestate velut a "supremo capite, primitus emanaverit."*

But then he adds:—

"Præter et ultra ea quæ tibi ex sacris literis divinitus commissa."†

"failed to fulfil them should be so reputed." Bp. Fitzgerald's charge, 1867, p. 23. The section was repealed in 1640. (Stephens, p. 361.)

* "All authority of declaring 'jus' and also jurisdiction of every kind, as "well that which is called 'Ecclesiastical' as secular, originally flowed from the "Royal power as from the supreme head."

† "Except and beyond those things which have been Divinely committed to "thee by the Sacred Scriptures;" of which "jurisdiction" was *not* one.

Queen Elizabeth chose to avoid the title of "head" as being open to misconception; she chose that of "Supreme Governor," which expresses the idea of jurisdiction still better, and which had been used by Henry in 1543, when he said: "As Christ is the Head of "the Universal Church, so kings be Head Governors under Him "in particular Churches." (p. 37-i.) This, as Parkhurst wrote (May 21, 1559) to Bullinger, "amounts to the same thing." ("Zurich Letters," I-29, compare Bright, Q. 5452.) In her official explanation appended to her Injunctions of 1559, Elizabeth claimed the self-same authority which was "*lately used* by the said "noble Kings of famous memory, King Henry VIII and King "Edward VI." The Irish Act (5 Eliz. c. 1) provides that the the Oath of Allegiance shall be "expounded" by this Admonition. Down to 1688 every clergyman had to swear, under this Act, to "assist and defend all jurisdictions, granted or belonging, or united "and annexed to the Crown;" and the statute 8 Eliz. c. 1, sec. 2, expressly identifies it as "the *same* jurisdiction" enjoyed by Ed. VI. (Stephens, p. 417.) Canon Stubbs omits to note that Convocation had, on February 28, 1558-9, addressed the Crown, asserting that "an authority for debating and settling those things "which belong to faith and the sacraments and discipline of the "Church, is a privilege which has always belonged, and ought to "belong to the hierarchy and not to the laity." (Collier, VI-206.) The two Universities, *although they then recognized the Papal supremacy*, declined to subscribe this, and Parliament replied by enacting this Statute (1 Eliz. c. 1), which, like the Act of Uniformity (1 Eliz. c. 2), was passed in despite of the adverse votes of every "spiritual" member of the Legislature.

The latter Act it will be noticed, runs only in the name of "the "Lords *Temporal* and all the Commons." (p. 230.)

13 Eliz. c. 12.

(*Imposing subscription to the Thirty-nine Articles.*)

The "legal" and "constitutional" history of this Statute, which imposes clerical subscription, "voids dispensations and "promotions," and imposes the penalty of "deprivation" by the sole authority of Parliament, is completely concealed. (p. 145.)

"The Report does just mention it, at p. xxxv., among a number

"of superseded or immaterial Acts, and not by its title. Convo-
"cation had nothing to do with that Act, nor with any other
"having reference to judicature."* Yet it was the turning point of the long struggle between Parliament and Elizabeth, in which the former came out victorious. Canon Swainson in his "History "of Article XIX." supplies many of the suppressed passages, as for instance, p. 18, Mr. Norton's motion

"Against the shameful and most hateful usage among the Ecclesiastical "Judges for delivering of clerks convicted upon their oaths and the "manifest perjury" thus occasioned "by *their* law against *the* law.' Whereupon "the whole House resolved to take care for redress."

This is given, as on April 14th, by D'Ewes, p. 167, from whom Canon Stubbs is quoting *loco citato*. Canon Stubbs mentions the Queen's direction "not to have the same dealt with by Parliament" (p. 145); but he forgets to state that the Commons, who had already read their Bill the third time (April 30) before the Queen's message arrived (May 1st), read it a *fourth* time upon May 3rd, and then sent it up to the Lords in answer to the Queen's challenge. (Swainson, p. 21.) The Queen had to give her Royal Assent just four weeks after sending the above-named message, which alone† Canon Stubbs chronicles. He mentions that Wentworth was imprisoned (he forgot to add, illegally) by the Queen. The following extracts from Wentworth's speech would have illustrated the subject:—

"I have heard of old Parliament men that the banishment of the Pope "and Popery, and the restoring of true religion had their beginning from "this House and not from the Bishops; and I have heard that few laws "for religion had their beginning from them."

He went on to say that Archbishop Parker had urged upon the deputation from the Commons of which Wentworth was spokesman:—

"'Surely, you will refer yourselves wholly to us therein?' 'No, by the "faith I bear to God,' said I, 'we will pass nothing before we under-"stand what it is; for that were to make you Popes; make you Popes "who list,' said I, 'for we will make you none.'"—*Swainson*, p. 26.

The Commons had sent up a similar measure in 1566, which

* "Letter to Archbishop of York," by Sir Edmund Beckett, Bart., Q.C., LL.D. (Murray), 1883, p. 16.

† Mr. Joyce, "Sword and Keys" (p. 139), similiarly quotes the Queen's message, and suppresses the result.

"was stayed in the House of Lords by the Queen's command, at "the instance of the Catholics, supported by the Spanish "Ambassador." (Droop's "Edwardian Vestments," p. 23.) But the long-suffering Commons then, as now, felt that upon Parliament rested the double duty of representing lay-resistance to sacerdotal pretensions, and popular resistance to arbitrary despotism. As Dr. Lamb, the Master of Corpus, in his "History of the Thirty-"nine Articles" observes (p. 25), "this seems to have been the "first successful resistance made by the constitutional party in the "House of Commons to that arbitrary authority in Church matters "which Henry VIII first assumed, and to preserve which his "daughter Elizabeth was peculiarly anxious. Hence, she interpolated "into the 20th Article the words 'the Church hath power to decree "'rites and ceremonies and authority in controversies of faith,' "which was equivalent to declaring *herself* 'the sole director of "'her subjects' faith.'" (Lamb, p. 39.) For, as Lord Audley told Bishop Gardiner, "you Bishops would enter in with the King, and "*by means of his Supremacy* order the laws as ye listed." (Froude, "Hist. Eng.," Vol. II., p. 291.) This Tudor-Stuart theory of a royal Pope (even though secretly wire-pulled by a courtier prelate) is not the "constitutional theory of the Royal supremacy," which in the Church as in the State [thanks to the "advice and consent" of Parliament] has been reduced to a personification of the Supremacy of Law "over all persons and in all causes."

No review of the theories of Canon Stubbs would be complete without a brief notice of his share in the Resolutions upon which the Report was based. (Vol. I., pp. 11-17.) It was he who moved (March 8th) that "the judicial authority resides in and PROCEEDS "FROM the Bishop alone;" a statement completely at variance, as we have now seen with the "legal history" of the Courts "AS "created or modified under the Reformation Statutes, and any "subsequent Statute." He, too, seconded the Resolution moved by a Bishop that a Bishop's "assessor" should be without "voice in "any decision." He it was who moved that "The Commissioners "think it very questionable whether the past history of the Church "of England affords any materials which could be satisfactorily "used to furnish precedent *or principle* for such a proceeding" [as the trial of a Bishop]; which being carried (in despite of

"historic continuity" and of "legal history") did effectually render nugatory the previous Resolution that the scheme of the Commissioners should "make provision for compelling obedience "on the part of Bishops to the law." (p. 17-i.)

But his choicest effort was an attempt to destroy the Lay Court of Appeal by moving (p. 13-ii.) an amendment which imported three things :—

First.—That the appeal should not be on the merits of the case, but only "for lack of justice," a phrase to which he endeavours to fasten the meaning of—only from a failure in procedure or an exceeding the province of the Spiritual Court. So much importance was justly attached to this, that on Canon Stubbs' amendment breaking down, another amendment was immediately moved to insert the words "for lack of justice." On this point a great struggle took place, as is shown by the closeness of the division, but at the next meeting it was carried by the lawyers "that all "appeals shall be by way of *rehearing* of the *matters* appealed "against." (p. 14-ii.) This sets at rest the pretence (of which we shall doubtless hear more hereafter) that the *Appel comme d'abus* is what the Commissioners intended. (*See* above, p. 44.)

Second.—He proposed to borrow from the old Court of Delegates as described at p. 183-ii., their cumbrous and round-about method of petitioning the Crown in Council to refer it to the Lord Chancellor to report to the Council whether "on consideration" he would hear Counsel to decide whether in his individual opinion the cause was "so important that it is fit to be heard and determined in "a most solemn manner." (*sic.*) Probably the learned Professor had been attracted to this particular precedent by reading in Mr. Rothery's Return (p. 187), that—

"The large number of appeals which seem to have been abandoned or "discontinued was no doubt owing to the peculiar facilities for pro-"tracting the litigation which the nature of the procedure offered."*

* *The Edinburgh Review* thus enumerates the "remedies" provided by the new Scheme against a man "guilty of contempt of Court." The unhappy prosecutor, probably a Bishop, must do the following things :—1. He must get the Court to pronounce a sentence ; 2. He must show that the sentence is disobeyed, and pray for suspension for a certain term ; then, 3. He must watch the close of that suspension, and see if he is still in contempt, and then procure a second sentence of suspension ; after which, 4. He must still watch for the fresh

Yet he finds fault with the Delegates for never having really "considered" "whether it were EXPEDIENT that appeals should "be permitted." (p. 47-ii.) This "expediency" he thinks could be judged of by the Privy Council, whose dealing with appeals is supposed to be "dictated by policy." (Report, p. v.)

Third.—He urged that the Bishops should be "recognized as a "Court of Doctrine" to decide those points which the Lord Chancellor should tell them were "spiritual law." This would be, as Archbishop Tait said, to constitute the Bishops "a sort of General "Council in commission, to make new laws according to the "Church's emergencies." (Brod. and Fremantle, Pref. xvii.)

Canon Stubbs' amendment was lost, whereupon the Earl of Devon, M.E.C.U., moved, and the Bishop of Oxford, late M.E.C.U., seconded that—

"The opinion of the Archbishops and Bishops . . . . shall be taken "by the Court as *conclusive* evidence of the doctrine and view of the "Church of England."

Four persons (presumably the same "four") voted for each of these propositions, which, being rejected, make it clear that the Commissioners do not make the reference to the Bishops proposed in their Report *binding* upon the Lay Court of Appeal.

But Canon Stubbs' amendments were all in perfect harmony with the tone of his "Draft Report;" and the Commissioners in striking out a sentence here or there, still left intact the context which implies and pre-supposes that a jurisdiction over baptized persons ought to be exercised solely by Priests in the "Courts of the Church" [clergy?] "*as distinguished from* the State." (Report, p. vi.)

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disobedience, and pray a sentence of suspension until obedience is rendered; and, 5. He must ask the Court to consider whether "the case requires" that he should be "deprived by summary process." Summary process! this Report deals in ironical expressions. At every one of these five stages the poor prosecutor must appear by counsel; and at each of them there may be, and at the last of them—or the deprivation—there will almost certainly be, all the cost and risk of a fresh trial. Wearied and impoverished, he will probably relinquish the contest long before the end; and the manifest intention to defer as long as possible the final step of deprivation will be realized.

CHAPTER IV.

Recommendations of the Commissioners.

On one point, and on one point only, was there absolute unanimity, viz., in condemning the "working" of the existing Courts. It was described (pp. v., vii.), as "complex, slow, inordinately expensive," needing "extensive reforms," "antiquated, cumbersome, unsuited to the requirements of the present day," "occult and complex," and involving "enormous costs and grave delays." Such, it seems, is the price we have been paying for "historic continuity." It was agreed that the "criminal" form given by ancient precedents (p. xxiv.) to all proceedings as to doctrine and ritual, enabled the accused Ritualist or Heretic to "take advantage of every slip," and led to "substantial injustice." (p. vii.)

That a fund ought to be provided to enable Bishops to proceed against immoral clerks was also agreed upon (pp. vii. and lvi.): and an almost equal consensus voted down the preliminary inquiry under the Church Discipline Act, 1840. (pp. vii. and lix.) Two features borrowed from the Public Worship Act, though devoid of "historic "continuity," met general acceptance, viz., the qualification of the individual judges (p. lvii.), and the power to make rules and orders. (p. lix.) Above all, the principle laid down by the Commissioners that "the pleading and procedure in all the Courts in contentious "cases shall follow as near as may be the practice and procedure of "the Supreme Court of Judicature in civil cases" was of the utmost value. The Commissioners held that there is no foundation in "legal history" for the theory that Convocation is or ought to be the "Court" for the trial of heretics. (pp. xxix., xxxvii.) They examined

and rejected the dictum on this head, of Lord Coke (p. xxxvii.), and adopted the teaching of Mr. Droop (Q. 2591), who is followed here by Canon Stubbs. (p. 45, ii.) A glance at the "theories of 'spiritual' "Courts" in the Index (page 93) will show that no point was more insisted upon by witnesses, or more contested than this. The rejection of Synods in favour of Courts logically carries with it the rejection of any trial of dogma, *as such*, and the substitution of the doctrine of "civil contract;" inasmuch as "Courts" are standards of "law," not of orthodoxy: while it was expressly urged by the advocates of Synods, that Synods are legislative bodies capable of altering the standard from time to time, so as to fit the case of the accused. (*See* Liddon, Qq. 7370-7380, and Littledale, Q. 4923, compared with Q. 5342.)

Unfortunately, the above enumeration exhausts the valuable features of the Report. For, the confusion above complained of (in chapter ii.) as to the meaning of "spiritual jurisdiction" is intensified by a perverse misuse, throughout the Report, of the word "Church." For instance, on the very first page the Commissioners speak of the Judicial Committee as a "lay tribunal" capable of disregarding the "voice of the Church," which they explain to mean the Episcopal Assessors. So, on p. xxii., they speak of the ancient historical principle in spiritual jurisdiction that "the Church should "dispose of the goods of an intestate for the benefit of his soul." (p. xxiii.) So Canon Stubbs had spoken in the "Draft Report" (p. 28-ii.) of "the jurisdiction OVER LAYMEN as a part and result of "the *visitatorial* and penitential discipline of the Church;" and the Prolocutor of Canterbury Convocation had complained of "the laity "acting in a harsh way as regards the Church." (Q. 4400.)

The reader of the Report is irresistibly reminded of the saying of Coleridge, the poet-philosopher:

> "I soon discover that by the 'Church' they mean the clergy ex-"clusively, and then I fly off from them in a tangent, for it is this very "interpretation of the Church, that according to my conviction, consti-"tuted the first and most fundamental apostacy."—*Lit. Remains*, III., p. 386.

A more complete inversion of the Scriptural use of the word could not be. The word "Ecclesia" employed by our LORD (in the passage relied upon as the foundation of spiritual jurisdiction,

viz., St. Matt. xviii. 17) was borrowed from the Septuagint version* of the Old Testament, where it is used some seventy times for the "congregation," but never as the name of an assembly of priests. It was the current name of a democratic political assembly in which the Greek Republics transacted their common affairs. As such, it is used in Acts xix. 32, 39.

To the "Ecclesia" all free citizens were of right convoked†—hence the etymology of the word—an assembly "called out" as if by the common crier. In the New Testament it is never used of the ministry as distinguished from the laity, while it *is* used of the laity as distinguished from the "Apostles and elders," Acts xv. 4, 22, 23, compare viii. 1. Unhappily, for polemical reasons, the word "congregation" used by Tyndale in his translation of the New Testament, and some thirty times in the Prayer Book up to the last revision in 1661, was changed into the word "Church," the etymology of which has no point of contact with the scriptural word "Ecclesia." Hence, even Royal Commissioners can speak of the "Church" *in contrast with* the "Laity," who, as the late Rev. W. Milton told the Commissioners, "ARE the holy Church." (Q. 1470.) Hence, they bring themselves—in spite of the evidence—to say (p. vi.):

> "There were but few dissentients from the view," that the presence of Bishops presiding in person in their own Courts, "would command "obedience which *would be* and had been refused to LAY officials."

This finding was after taking evidence that Mr. Mackonochie (Qq. 3438, 3450), Mr. Bodington (Q. 4126), and Mr. Green (Q. 5975) had *in fact* rejected this very "personal" Court; that Mr. Edwards appealed to a Jew in the Prestbury case (Q. 4292); that in the Denison case a Court presided over by the Primate and constituted just as the Commissioners now recommend, was appealed against to the Privy Council, so that the Archdeacon still retains his living in despite of a sentence pronounced by a "Spiritual Court," which the sanguine Commissioners say "*would be* obeyed;" lastly, that in the Gorham case the finding of the two Archbishops is rejected

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* Girdlestone's "Old Testament Synonyms," pp. 363-71.

† Trench's "Synonyms of the New Test.," p. 1.

by the priest-party in favour of that of the lay-delegate, Sir Herbert Jenner Fust. (Qq. 2234, 2329.) In the Exeter reredos case, too, the Commissioners were reminded by Sir R. Phillimore that the Bishop of Exeter, sitting with his legal assessor, was appealed against successfully to the Privy Council. (Q. 3099.) The Commissioners wisely forbore to ask the witnesses whether the laity were likely to be satisfied with merely clerical judges, else they might have elicited replies like that of King Henry VIII :—

"There is nothing that the clergy might through dread and affection "so well be deceived in, as in things concerning the honour, dignity, "power, liberty, *jurisdiction* and riches of the Bishops and clergy; and "some of them have of likelihood been deceived therein."—*Froude*, II-220.

There is, in fact (as Sam Slick said), "a great deal of human "nature in" spiritual persons. When, therefore, the Rev. G. Body claimed to be provided with a Court "holding credentials which are "not simply of man" (Qq. 3570, 3649), something more would be needed to satisfy his ideal than the "personal" sitting of a Bishop in Court.

Another grave defect in the Report as to the "working" of the Ecclesiastical Courts consists in the Commissioners not having considered the anomalous condition of the "law" administered by these Courts. Every mediæval Canon, Constitution, or custom which a Spiritual Judge may hold to have *not* been contrary to Royal Prerogative, Statute, or Common Law may be enforced as "law" in those lurking places of "historic continuity." Sir R. Phillimore, as Dean of the Arches, laid it down in *Martin* v. *Mackonochie* that the "Constitutions contained in Lyndwood are "still binding upon the Church of this Realm;" and he devoted twenty-three pages of his Judgment to maintaining the "identity "of the status of the Church before and after the Reformation," as a basis for his decision in favour of altar lights. (Phillimore's Report, pp. 30-53.) As a Royal Commissioner he now urges that "there should be no appeal from the Arches Court." (Report, p. lxiii.) As a text-writer, he says, "Prohibition ought not to be granted "where the Spiritual Court proceeds according to *its own* rules and "*Canons* in a matter triable before it." (Phill., "Eccl. Law," p. 1440.) A Bishop may prosecute *ex mero motu* any of his clergy for "neglect of duty" (p. lv.—whatever that elastic phrase may be

construed by a "personal" court to mean); and he may obtain his expenses for doing this from "some public source." (p. lvi.)

Supposing then that an Archbishop sitting in person should confirm the judgment of the Bishop sitting in person, each of them, it may be, acting upon his individual judgment in opposition to the advice of his assessors (see p. lviii.), and in reliance upon some pre-Reformation precedent or clerical edict, what protection could the poor parson or layman find save in a strong Court of Appeal? In the absence of such a corrective, we cannot doubt that there would grow up a craving for "historic continuity" with a revival of those superstitions which moulded so many ancient Canons.* Rev. B. Compton (examined at the special request of Sir R. Phillimore, p. 3-i.) tells us that by the "common law of the Church" the laity would be "compelled to receive the mixed chalice" (Q. 2784), and a clergyman might be tried for "conduct unbecoming a Priest." (Q. 2744.) Chancellor Phillimore (Q. 1911), and Mr. Mackonochie (Q. 6132), tell us that the Bishops *must* be elected; so that the personal judge may be the mouth-piece of the dominant majority among the clergy. *Væ victis!* The Bishop who decides against the

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* The Rev. T. W. Perry, formerly a member of the Royal Commission on Ritual, and since member of the Council of the English Church Union, published in 1857 a selection of ancient Canons still in force. From the Canons of Archbishop Walter, A.D. 1195, he selects this one, "A priest may not celebrate "mass twice a day, unless the necessity be urgent. When he does, let nothing "be poured into the chalice after the receiving of the Blood at the first cele- "bration; but let the least drops be diligently supped out of the chalice, and "the fingers sucked or licked with the tongue and washed, and the washings kept "in a clean vessel to be had for this purpose; which washings are to be drunk "after the *second* celebration." (The water, *not being transubstantiated*, might otherwise break the priest's fast). Mr. Perry adds, in a parallel column, this note:—"All these laws are still in force, and might be a most useful and "very practical guide to the clergy of the Church of England." ("Lawful "Church Ornaments," p. 478.) Of a similar Canon of Archbishop Langton's, A.D. 1222, Mr. Perry says (p. 477), "neither of these three Canons has ever "been repealed; they are entirely in consonance with the whole spirit and "letter of the Prayer Book, excepting the last clause of No. 6, to which we have "no equivalent direction: the object of it was to prevent a priest, who had to "celebrate twice, from breaking his fast (as he was held to do) by consuming "the rinsings of the chalice *after* his *first* celebration, but the difficulty probably "does not often occur with us, and when it does, *the Canon is easy of application.*" On Archbishop Lanfranc's Canon, A.D. 1071, "Of Altars that they be of stone," Mr. Perry adds, "Never repealed." ("Lawful Church Ornaments," p. 471.)

majority will do so "at his own peril." (Rev. B. Compton, Q. 2814.)

The Discipline of the Laity, which Chancellor Phillimore and the Hon. C. L. Wood (see Index, "Laity") insist is the "proper" business of an Ecclesiastical Court, was brought forward July 21st, 1881, and urged upon two subsequent occasions by Sir W. James, but ordered to "stand over." For, as Mr. Rothery says (p. 180-ii.), it "would be repugnant to the ideas of the present "day." But this, as Mr. Gladstone says, "might be dealt with at an "after time." "If," says *The Church Times*,* wistfully—

"If we had a clergy with coercive jurisdiction, so that the parson could "of right enter any house in his parish when he pleased, summon all its "inmates, from the father and mother to the youngest child, examine "them as to their faith and morals, and instruct or rebuke them, as "circumstances might seem *to him* to require. If we had such a "parochial system as that, it would, no doubt, argue extreme folly to talk "of giving it up."

There is a very suggestive mention on p. 165-i. of the refusal by the Queen's Bench, in 1622, of a Prohibition in the case of a woman excommunicated for coming to be churched in her ordinary dress, because seven Bishops certified it to be the custom† of the "Church" to wear a veil!!

Not a word had the Commissioners to say on the profane use of Excommunication to collect fees, or to punish some trivial offence against the monetary interests of the plaintiffs, or of the Court. Yet, who can doubt that its lavish employment has been a gross scandal? Canon Stubbs reminds us that King James suggested that excommunication might be "surrendered for some other "equivalent form of coercion" (p. 46-i.); and Bishop Wilberforce's remark is surely worth pondering:—

"Excommunication seems to me a dangerous, awkward, and, upon the "whole, an inefficient weapon. I think nothing but difficulty and

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* Leading Article, April 14, 1882.

† "Assuming the order of the Court to be lawful, how can it be enforced?" asked Dr. Deane. "I do not know what could be done in the case of the Laity "except imprisonment," replied Chancellor Phillimore. (Q. 1872.) The Commissioners think imprisonment undesirable for lawless clergymen (p. lix.), but so beneficial for the laity that they recommend that the process of *significavit* and the issue of the *writ de contumace capiendo* should be simplified. (p. lx.)

"entanglement ever came from excommunicating the Anti-Popes. As "long as they had a following their believers disregarded it; and when "the schism was healed it was an awkward fact to have to deal with. I "do not remember that any of the excommunications were formally "taken off, and yet, on the other hand, none, I think, were maintained in "the long run."—*Life of Wilberforce*, III-128.

Such an excommunication as St. Paul describes, inflicted "by the "majority," ὑπὸ τῶν πλειόνων (2 Cor. ii. 6), who thus "put away "from among them*selves*" (1 Cor. v. 13) the offender, has nothing in common with a process in Court, which fails to carry conviction to any litigant's conscience, or to be ratified by the sense of the Christian community. Surely it is time that this profane travesty of sacred things should cease. All over Europe the attempt to "play Providence" over the morals of the laity has been abandoned as a failure and something worse. Canon Stubbs tells us that King Henry VIII "made use of the anti-clerical feeling in the "House of Commons." (p. 32.) He had previously told us, in his "Constitutional History" (Vol. III., p. 523), how this anti-clerical feeling arose. It was—

"Especially the ever-spreading and rankling sore produced by the "*inquisitorial, mercenary, and generally disreputable* character of the "Courts of Spiritual Discipline, an evil which had no slight share in "making the Reformation inevitable, and which outlived the Reforma-"tion, and did its worst in alienating the people from the Church "reformed."

Perhaps the learned Canon is mistaken here, since it may be that by adopting the recommendations of the Royal Commissioners of 1883, the "worst" has still to come. Those who yearn to see "Discipline of the laity" restored should study the *Reformatio Legum*, which provides that some of the "ancients of the parish" should be associated with the minister; and in the "form of "receiving penitents" the minister was to "*ask the people whether* "*they would grant his desires;* who were to answer they would; *then* "the pastor was to absolve," &c. This was regarded in the sixteenth century as a return to "Church" principles as contrasted with sacerdotal autocracy, and it is on these lines, if at all, rather than in "Courts," and by "personal" judges that the "power of the "keys" may be profitably exercised hereafter.

The argument pressed by the "Synod" party for having a purely

clerical Court of Appeal, was that "judge-made law" might supplement or even supersede the tradition of the Church. But this consideration is evidently a reason for providing means of *legislating* for the Church, not a reason for confounding the functions of a judge with those of a legislator. If it be true that no suitable organ of legislating can be found, owing to Convocation having failed to gain the confidence of the laity, that does not warrant our trying to alter the law by means of *Courts* clericalized for that purpose. The very definition of tyranny has been said to be the union of legislative, executive, and judicial powers in the same person; yet this is precisely what the system of "personal" Courts involves.

Objections to the Commissioners' scheme may be conveniently discussed under its three heads of Diocesan, Arches, and Appeal Courts.

1. The Bishop's Personal Court

is objectionable for the following reasons:—

I. Himself a clergyman, elderly, and in easy circumstances, who has to "live with" his clergy, the Bishop is described in the Report (p. xvii., xxiv.) as the official "Protector* of the clergy;" but *laissez-faire* favouritism to the clergy is unfair to those from whom he "protects" them. Canon Trevor witnesses (Q. 7554) that there is "great ill-feeling at the Bishop hushing it up and "letting a man off." (*See* Qq. 4081 and 7644-9.) In some cases, again, the Bishop is the "Adviser" of the churchwardens and others who consult him, and who act, or decline to act, upon his advice; he is, therefore, manifestly unfit to sit afterwards as a "Judge" upon the results of that action.

He is *Inquisitor natus* (p. xxv.)† and, as such, in cases of heresy and scandal both prosecutor and judge! He is administrator and chief Pastor in his diocese, and, as such (unless his

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* Chancellor Espin's anecdote, in which a Commission reported that there was "no *primâ facie* case," though the Spiritual Person had already been in gaol two months for an indecent assault (Q. 599), his second offence, illustrates the danger of professional bias.

† Abp. Courtney, "Legate of the Apostolic See," in 1382, tells the Bishops of his Province that "by the institution of the sacred Canons, they be in their "respective Dioceses, Inquisitors of heretical pravity."—*Foxe*, III-24.

mouth be unduly closed, and his action crippled), he must be known to have committed himself publicly on the very questions litigated before him. His real strength lies in the influence and persuasion which his character and position enable him to bring to bear, but this is at once destroyed by making him the executive officer of a coercive jurisdiction "residing" in his own breast. He is a law-maker for the Church, and as such ought not to be the judicial interpreter also. He is a hardworking busy man, and as such, unable to be master of that chaotic system of archaic, obscure, and very questionable bye-laws which the scheme requires him to lay down with undivided responsibility. For, though the assessors must be creatures of his own, chosen *pro hâc vice*, so as to facilitate the particular decision wished for in each case, yet the dummy-assessor "has no voice in any decision."* (p. lviii.) These assessors, if Theologians, are already marked with stars and daggers in the "Clerical Directory" so as to ensure prejudice; while the lay-assessor is no longer to be necessarily the trained and irremovable Chancellor, but may be some amateur lawyer who may be as ignorant of ecclesiastical law as the Bishop himself, but may also be known by the Bishop to share his own views. Canon Stubbs actually claims (*see* 46-ii., answer 4 to question 4, p. 45-ii.) that the Bishop is free from restraint by the precedents *of his own Court!* Mr. Beresford Hope counts that the Bishops will agree upon a "code" and "work it according to their discretion." (Q. 6432.) The legal assessor may be changed at discretion from case to case *pro hâc vice*. (p. lv.) Such a Court among secular persons would be called a "packed" one.†

II.—The "personal" Court has been already tried and found wanting. The reason assigned by the antiquarian witnesses for the appointment of lay-commissaries is that the "Archbishops and "Bishops" (who were at that time more numerous in proportion to the population) "had so much to do" that the Archdeacon's Court became the more popular, since the Archdeacon could be chosen for his knowledge of Church law, and had leisure to administer it.

* "An assessor who, after all, has only the privilege of being disregarded, "stands in a very anomalous position," says Mr. B. Hope. (Q. 6350.)

† So Bishop Wilberforce designated in the Denison case the very court which the Commissioners now recommend. ("Life," II-327.)

"They were generally kept in deacon's orders in order that sacerdotal "hands might not be soiled with the questionable matter that was "brought before them,"

says Canon Stubbs. (p. 26, i.) The Bishops were compelled very early to appoint Chancellors lest all the business should leave their Courts. (Qq. 1282-4.) So early as A.D. 1303 this was the case in the diocese of London. (Q. 3242.) Sir Edmund Beckett tells us that the Bishop for ages had no power of sitting judicially, except through his Chancellor, until (in the year 1840) Bishop Philpotts slipped into the Church Discipline Act (the repeal of which is recommended by the Commissioners), a clause giving the Bishop power to sit *instead of* the Chancellor. (Q. 5634.) But this Act-of-Parliament-made Court, though both "personal" and "spiritual," has proved an utter failure; all parties give it the go-by in order to get into the Arches Court, where no Bishop sits. So again, under the Public Worship Regulation Act there is provision made for the decision of the suit by the Bishop sitting personally; but in not one of the nineteen representations under that Act has the clergyman consented to submit to this personal jurisdiction. (Qq. 4129 and 4482.) Mr. Mackonochie, Mr. Bodington, and Mr. Green (Q. 4182) are in evidence as having refused this spiritual and personal judge.* (*Supra*, p. 67.)

III.—The Royal Commission of 1830-2 (on which sat Archbishop Howley and Bishops Blomfield, Van Mildert, Kaye, Carey, and Bethel, with Chief Justice Tenterden, Chief Justice Tindal, Chief Baron Alexander, Sir John Nicholl, Dr. Lushington, and other distinguished judges and civilians) made a Report, in two parts, from one of which considerable extracts are given in the report of the present Commission, Vol. I., pp. 194-207. Dr. Joseph Phillimore, the Chancellor of Oxford, gave evidence and made an excellent suggestion, viz., to retain the "voluntary or consensual juris-"diction," *i.e.*, in plain English, the purely administrative and ministerial part of diocesan government, adding that "*it would* "*be of infinite advantage that the contentious jurisdiction of all the*

* Nor is such distrust at all new. Mr. Ffoulkes, the Vicar of St. Mary the Virgin, Oxford, said he could cite numbers of mediæval Canons "where just the "same language is used against the constitution of some of those courts in those "days as was afterwards used in the Commission of 1830." (Q. 2271.)

"*diocesan Courts should be taken away.*" (Report, 1832, p. 152, Qq. 21, 23.) This would leave such matters as the grant of marriage licences, faculties, institutions to livings, &c., untouched. Moreover, it would be easy to graft upon it the suggestion of the Archbishop of York (p. lxi.), viz., that with consent of both parties the Bishop might make an Order which should be binding, if not appealed against, until reversed. The same safeguard against collusion might be imposed as in "faculty" cases, and the Bishop's "discretion" be limited to points *not* already ruled by higher Courts. For, as Mr. Girdlestone excellently observed, "the Bishop "may and often does exercise benevolent and fatherly care . . . . "but when the parties have *got beyond fatherly treatment*—when "they appeal to justice, they are entitled to receive justice according "to *law*." (Q. 4080.) In other words, "spiritual" influence, *properly* so-called, ends where "law" and "Courts" begin. (Q. 6331.)

The Royal Commissioners of 1832 reported that "THE TRANS- "FERENCE TO THE PROVINCIAL COURTS OF THE JURISDICTION HITHERTO "EXERCISED BY THE DIOCESAN COURTS, WOULD BE A GREAT IMPROVE- "MENT IN THE ADMINISTRATION OF ECCLESIASTICAL LAW."

In 1855 the late Dr. Stephens, under the direction of the Solicitor-General,* drafted a Bill for cutting down the fifty Diocesan Courts of England and Ireland to six. Dr. Tristram, the Chancellor of London and of Hereford, witnesses that "it would be more con- "venient that all questions of doctrine should be determined, in "the first instance, in the Metropolitan Courts, also questions of "ritual, unless BOTH parties desire the trial to take place in the "Consistorial Court." (Q. 3321.) The reason assigned by the Royal Commissioners of 1832 (p. 199) was that it was then impracticable to get judges duly qualified, "with a competent bar and skilful "practitioners," for, the "emoluments of the judges and other "officers and of practitioners in these Courts make it impossible in "the greater number of dioceses that efficient Courts can be main- "tained . . . from these considerations it appeared to us advisable "to recommend the *transfer of the whole contentious jurisdiction* to

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* *See* "Correspondence upon the proposed Church Discipline and Registry "Act, 1855," with the Archbishop of Armagh.

"the Provincial Courts." The reasons which were powerful then are ten times more powerful now. (p. li.) All the testamentary and matrimonial suits have been since taken away from these Diocesan Courts: Doctors' Commons has been sold and the property divided.* (Q. 3194.) Hence some of the Priest-party advise that the clergy shall study canon law and practice at the bar of these Diocesan Courts, and for this purpose the chairs in canon law which were swept away on the passing of the Reformation Statute of 25 Hen. VIII, c. 19 (p. xxviii.), are to be restored. (Qq. 3198, 6407.) These gentlemen forget that already by 33 and 34 Vic. c. 28, s. 20, an attorney or solicitor may practice as proctor in the Diocesan† Courts: and this circumstance, together with the recommendation before mentioned for assimilating procedure to that of the Supreme Court of Judicature, may possibly infuse into these Courts an uncanonical element of justice and common sense. If it were true that the numbers of the clergy are so much in excess of the work to be done, that it is desirable to find employment for the superfluous members of the profession, this plan of educating clerical canonists might deserve respectful consideration; but, on the other hand, there would have to be considered the danger to the clergy themselves of saturating their minds with a system of canon law which was formulated at a time when the most arrogant theocratic pretensions of the clergy found ready acceptance at the hands of an uneducated and semi-barbarous laity: when materialistic conceptions had obscured the very meaning of the word "spiritual;" when thaumaturgic powers were believed to be lodged in the hands of the priesthood; and when wholesale forgeries had been successfully employed as the basis of the received system of spiritual "law."‡ An ingenious writer in "*The Churchman*" Magazine based his hopeful anticipation of a good effect upon the clergy from their study of law upon the idea that the national law

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* "In the late financial year £55,809. 16*s* 1*d* was paid to the officers of the "*abolished* Ecclesiastical Courts."—*Times*, October 15, 1883. Does not this prove the *value* of "historic continuity"? (Q. 4343.)

† By the Legal Practitioners' Act, 1876, this has been extended to the Provincial Courts.

‡ *See* Janus, chapter iii. Probably the earliest of these forgeries was the "Apostolic Constitutions." But forgery has always been a "Catholic practice."

of England would be the subject of their studies; but no two things can be more opposed in spirit than the National common law of a free people and the enslaving superstitions which found expression in "Canon Law." A very curious feature brought to light in the Report is the disparagement of the merely English "canons." (*See* p. xxxvi, *cf.* 144, 150.) Doubtless it is hoped that under the ruling of clerical Judges "historic continuity" will supplement what is merely "insular" and "Anglican," by what is truly mediæval and "Catholic" (*sic*).

IV.—But by far the gravest blot upon the scheme of the Commissioners is their proposal to give to individual Bishops the power of vetoing all proceedings at their individual "discretion." The most perfect system of simplified and codified law, and the best constituted Courts would be alike worthless if access to the portals of justice is to be thus barred. Reference to the Index under the head of "Veto" will show that the evidence of witnesses was all the other way. The witnesses who favoured the veto were unable to give any *evidence*, but substituted theories of what they supposed to be expedient. Instead of the clergy being surrounded, as was supposed, in every parish by loyal and enthusiastic supporters whose sympathy might be relied on beyond what is granted to members of any other profession, these witnesses drew a picture of the clergy as surrounded by cantankerous and malignant foes, against whom a Clerical "Judge" in the Diocesan Court was their natural protector. Lawyers and doctors know what it is to be prosecuted for malpractice by unscrupulous and worthless people, who try to extort money; and no one has yet proposed to "protect" them by giving a veto upon proceedings to the heads of those professions. Yet if a Royal Commission could be got to listen to such proposals, no doubt many "witnesses" could be found who would urge upon them theories of this kind. In the "Church" alone, "Martyrdom" *pays*. The veto is unknown in the Isle of Man (Q. 6717), where ecclesiastical suits are very cheap. (Q. 6679.) It is unknown also in the Established Kirk of Scotland, where

"Any male parishioner may prosecute for heresy, and the Presbytery "have no power to decline taking up the case. And it is not necessary "that a parishioner should be in communion with the Church."—*Innes' Law of Creeds in Scotland*, p. 211.

It is remarkable that this fact is not mentioned in the Commissioners' account of the Scottish Establishment. (p. ix.) Frivolous suits are unknown where the law is clear, and definitely ascertained, and where its enforcement is swift and cheap—as in Scotland and in the Isle of Man.* In England, frivolous suits might by this means be prevented; for, as the Right Hon. E. P. Bouverie testifies, "the ordinary Englishman does not like to "put himself forward: he is a very diffident man, and does "not like to stand forward and oppose what is being done by "a man who is respected and liked in the parish." (Q. 5113.) And moreover, as Mr. Girdlestone urged, "the social and pecu-"niary dangers attendant upon an effort to obtain justice against "a clergyman are so great." (Q. 4261.) Even if it were true that clergymen, like exotic plants, need extraordinary solicitude to "protect" them, it need not be at the cost of denying justice to everybody else. At least two other plans were proposed. Mr. Droop would make the veto subject to an appeal (Q. 2645); and this might be either to the Archbishop personally, or to the Arches Court. Then Mr. Valpy suggested that the certificate of a barrister (of seven years' standing) that the complaint is made *bonâ fide* and relates to points ruled to be illegal, or which involve a breach of trust, should suffice. But the majority insisted upon conferring upon each individual Bishop power to dispense his clergy from obedience to the law of "this Church and realm." They say, indeed, "it is better to make the Bishop responsible" (p. liii.); but they are careful to provide that there shall be no one on earth TO WHOM he is "responsible." Readers of "The Life of Bishop Wilberforce," who remember how Sir R. Phillimore was a member of that inner circle who met each day in private before the meetings of the rest of the Ritual Commissioners, and who, as the biographer tells us, "did virtually settle the Report" ("Life of Wilberforce," III-214), will notice with interest that Sir Robert never thought it worth while to attend another meeting of the present Commission after the Veto had been carried. He naturally felt that with the Veto it mattered little what the "law" or the constitution of the Courts might be. Lords Penzance and Chichester, with Dr. Deane, were

* Which is to retain its ancient freedom, p. lx.

among the absentees at that division upon the Veto question. Another point of resemblance to the Ritual Commission may be noted. Bishop Wilberforce's biographer records with a chuckle: "'The judicious use' (by the Ritual Commissioners) 'of the word "'restrain' with regard to the vestments, instead of the word "'abolish,' or 'prohibit.' The main body of the Commissioners "*failed to perceive* the elasticity of this word, which, in fact, did "leave a loophole." (*Ibid.*) The language of the Minute of March 9, 1883, was no less "judicious." It spoke only of "leaving it to the "Bishops to give *permission* to the complainant *to proceed.*" A harmless-looking suggestion which perhaps the majority "failed "to perceive" involved the power to *refuse* permission. No doubt, at the following meeting, Archbishop Tait being no longer chairman, this was ruled to have been decided, for no division took place. With how little wisdom can a great Church be governed! In vain had Mr. Blakesley reminded the Commissioners of that article of Magna Charta, "we will sell to no man, we will *deny to* "*no man, nor make any difference* as to justice and right." "Judg- "ment, justice, and truth," it seems, are *secular* matters; but "Spiritual" judges must in future be armed with a dispensing power to condone violations of the law, committed with a high hand, and (it may be) even by public conspiracy. Mr. Valpy pointed out that in eight cases in which the episcopal Veto had shielded the wrongdoer every one of the illegal practices went on as before. (Q. 6253.) Bishops we know are peculiarly liable to backstairs' influences. Every mail brings them letters from ardent partisans, or weeping mothers appealing to their emotional susceptibilities, or conservative timidity. We are told how "Lord "Aberdeen in translating Lord Auckland from Sodor and Man to "the See of Bath and Wells, *stipulated* that he should neither per- "secute Mr. Bennett, nor prosecute Archdeacon Denison." ("Life "of Bishop Wilberforce," II-240.) We learn from Vol. III., 268, of the same valuable work, that the Prime Minister attempted to influence the "Judicial" action of Archbishop Sumner. These influences explain the otherwise startling fact that the Denison case broke down ultimately through delays occasioned by the negligences of three successive Bishops refusing in their judicial

capacity to administer the law of which they were the appointed guardians.*

Apart from the pressure which a Prime Minister (himself, perhaps, a bit of a theologian) might exert, we have now-a-days an organized system of lampooning in "religious" newspapers which stir up sedition in every diocese, of which the administrator dares to do his duty. In the words of the amendment moved by the Archbishop of York, and seconded by the Dean of Peterborough,

"The investing the Bishop with the unconditional power of veto on "any complaint against a clergyman would deprive the laity of the "power of obtaining a decision in case of wrong, and would lead to variety "of practice in different dioceses and would also be *invidious toward the "Bishop* as making him practically the prosecutor in every case where "the proceedings went on." (p. 12.)

"The active interference of the Bishops to prevent the law of the land "being enforced," said the Lord Chief Justice Coleridge, "is as indefen-"sible in theory as it is *fast becoming intolerable in practice.*" He added, most justly, that this power is "more likely to be abused in proportion "to the strength and earnestness of character of those who claim it; "finally it is one which, desiring to speak with all respect, I must think "*has in fact been abused.*" (p. lxii.)

No one who reads the evidence of Messrs. Girdlestone, Valpy and Howard, especially that of the first-named witness, will fail to see that Bishops cannot prudently be trusted with such unconstitutional and dangerous "dispensing" powers. Before quitting the subject of our numerous petty Diocesan Courts it is well to turn to the Index where, under the head of "Court of First Instance" (p. 95), "Registrar's Blunders," will be found a few illustrations of the cost of payment (by fees) of this class of officials. The Rev. Chancellor Espin wishes to increase the fees of the spiritual officials by sweeping into their net the election of Churchwardens and other business belonging to the "secular" tribunals from time immemorial. (p. 17-ii.)

2. The Arches Court.

The Commissioners of 1832 sugggested the fusion of the two Provincial Courts. The 6 and 7 Victoria, c. 38, sec. 17 (1843),

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* See "Statement of the Proceedings in Ditcher *v.* Denison" (Hatchard) and *Monthly Intelligencer* for March, 1883, p. 58. (John F. Shaw.)

contemplated it, and its advantages are obvious. The avoidance of conflicting decisions in Courts of equal status, the improvement in the salary of the ill-paid Judge, and the possibility of having the very best man in the country, with the formation of a resident Bar, are among those advantages; but the objections before raised to the "personal" Court apply with increased force to the Archbishops' Courts.

"So many other qualities are of necessity to be regarded in the "choice of Archbishops," says Mr. Gladstone, "that they can very "rarely be the best theologians of the Episcopal Bench." ("Royal Supremacy," p. 54.) A worthy Bishop is much too busy and useful as an Ambassador of Christ to be a learned lawyer; much less, then, can an Archbishop be fit to revise "personally," and bring into permanent reconciliation, the conflicting judgments of the Diocesan Consistories of a whole Province. One of the Commissioners—who, as Dean of the Arches, had more of his judgments reversed than any of his predecessors—reported that there ought to be no appeal from the Archbishop's Court. (p. lxiii.) His fellow-Commissioners had agreed with him (p. vi.) that the Dean of the Arches is "the principal Judge of the Church of England," and that the Ecclesiastical Courts were "Courts of the Church AS "DISTINGUISHED FROM the State" (whereas the Reformation statutes had described them as Courts of the "Realm," a "body politic," of which the King was "head"). The Dean of Arches, they said, had "*unquestionable ecclesiastical* authority, whilst his Court is to "be subject to an appeal to a purely LAY tribunal." (p. liv.) This is explained (p. liii.) on the principle that "no Ecclesiastical Court "can bar the right" of access to the Throne, and on this ground alone "judges learned in the law" were to hear the appeal from "spiritual judges." This assumes that the Court of Appeal is not an "Ecclesiastical Court," but a "Crown Court"—a foreign power, as it were—interfering with a jurisdiction not its own, but derived from another source—a doctrine which, however true, is clean contrary to the "Reformation statutes." The apologetic way in which the Commissioners palliate the profane intrusion of a "lay" Court shows how gladly they would minimize its control. This is accordingly done by several provisions. Before considering them, however, the following sentence should be noted (p. liii.) :—

"The function of such lay judges as may be appointed by the Crown "to determine appeals is not in any sense to determine what is the "doctrine or ritual of the Church, but to decide whether the impugned "opinions or practices are in conflict with the authoritative formularies "of the Church in such sense as to require correction or punishment."

That is perfectly true; but it would have been equally true to have said "the function of *spiritual* judges is the same." All "judges," *as* judges, and all "courts," *as* courts, have the same function.* For instance, Sir H. J. Fust, Dean of the Arches, said, in *Faulkner* v. *Litchfield*:—

"As I understand the question, it is simply one of the construction of "the rubric and Book of Common Prayer, which are incorporated into "the Statute of Uniformity passed in the 13 and 14 Charles II, and of "the Canons. In proceeding to consider this statute, the Court must "proceed precisely in the same manner as it would in construing other "Acts of Parliament."—1 *Robertson*, p. 198.

Again, in the case of *Sheppard* v. *Bennett*, the superior Court censured the expression of "extra-judicial opinions" on theological subjects by the Dean of the Arches, remarking that "it is not the "part *of the Court of Arches*, nor of this Committee, to usurp the "functions of a Synod or Council." Similarly, Lord Stowell, the Judge of the Consistory Court of London, said:—

"If any article is really the subject of dubious interpretation, it "would be highly improper that this Court should *fix one meaning* "and prosecute all those who hold a contrary opinion regarding its "interpretation."—1 *Haggard*, p. 429.

But if Clerical Judges, presiding "personally," are taught by a Royal Commission that it is the business of Spiritual Courts to "determine the doctrine or ritual of the Church" in contra-distinction to the "Lay" Court which deals only with "authori-"tative formularies," we shall soon have "changed all that." There is not a single important decision of the Judicial Committee which does not contain a disclaimer of interference with the theological aspects of doctrine or ritual which come before it, and which are considered solely and exclusively as questions

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* See the admission of Rev. E. S. Ffoulkes (Q. 2281), and Canon Bright (Q. 5495), and the *catena* of "spiritual" judgments furnished by Mr. Valpy. (Q. 6305.)

of law; so that in this respect the new Court of Appeal makes no change. The Commissioners propose that "only the actual "decree should be of binding authority in the judgments . . . "and that the reasoning . . . should always be allowed to be "reconsidered and disputed." This again makes no change whatever. The witnesses proved that this is, and has always been, the received theory and practice of the Judicial Committee (*see* Reeves, Qq. 6725-6734, and Beckett, Q. 5543) which has even permitted a re-hearing. (Qq. 5644, 6752.) Up to this point, then, we have seen no reason assigned (apart from the enumeration of the opinions of witnesses contradicted by other witnesses—p. v.; and see Index, "Privy Council," p. 98) for discarding the Judicial Committee The Report says (p. liii.), "we hold it to be essential that only "the actual decree, *as dealing with the particular case*, should be "of binding authority in the judgments hitherto or hereafter to "be delivered." A writer in *The Churchman* for December, 1883, p. 217, has called attention to the interpolation into this sentence of the word "hitherto," which is not found in the original resolution of April 5th, 1883 (p. 14); which resolution is *correctly* cited in p. lviii. of the Report, but into it the draughtsman has contrived to introduce here* the apparently unauthorized word "hitherto" for the purpose of evacuating all "historic continuity" in spiritual matters by abolishing precedents. If this enormous change is to be introduced into English law it ought to be done in a more grave and formal manner than by an inference from a single word (*interpolated*, apparently, by a single individual), the force of which the majority of the Commissioners may have "failed to perceive." As Lord Penzance observed (p. lxvii.)—the effect would be that "no legal "principle would be asserted or established," and that "such a "system, if acted upon for half a century, would destroy the "ascertained law altogether."†

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* Without providing it with any corresponding tense of the verb "deliver."

† The Commissioners of 1831 recommended the Privy Council (p. 194) as the Court of Appeal because "It is usual at the Privy Council for the "presiding Law Lord to deliver the grounds of the judgment, which, being "thus known and reported, tend to *settle principles* and to *establish uniformity* "of decision."

3. The Final Court of Appeal.

The objections to the Commissioners' changes in the Appeal Court amount to this, that the changes seem to have for their object to make the control of the Supreme Court over the inferior Courts altogether nugatory.

1. They degrade the standard of qualification for its members. The Commissioners say (p. xliv.) :—

"The reasons given for the abolition of the Court of Delegates are . . . "the want of uniformity in its decisions, and the silence observed by the "Court as to the grounds of its judgments. The reasons given for the "substitution of the Privy Council are chiefly the superior qualifications "of its members, the permanent existence of the tribunal, and the "publicity given to the reasons of the judgments."

They explain (p. xlii.) that—

"The practice was to appoint the Delegates according to a rota," and "the fact that the reasons for their judgments were not given seems to "have been regarded as infusing an element of uncertainty as to the "nature of the law administered by the Court." (p. xliii.)

It seems hardly credible that after giving this just summary of the recommendations of a former weighty Royal Commission, the Commissioners of 1883 should proceed to recommend every one of the condemned features as (retrograde) changes to be adopted in the new Court of Appeal.

2. The Commissioners of 1832 said (p. 193): "The division of "opinion of a Court so constituted being known, becomes a ground "of dissatisfaction to suitors." The Commissioners of 1883 say (p. lviii.) : "each Judge shall deliver his judgment separately." The effect of dissident opinions in weakening the deliverance of a Judgment intended to be "final" was well pointed out by Mr. Gladstone to Bishop Wilberforce (1862) when, deprecating any individual utterances of episcopal judges, he wrote as follows :—

1. "Constitute these episcopal referees into a body; make them not "plural but singular, by calling them a Court, Committee, or—perhaps "better—a Board. It is only as a body, not as individuals, that they "can have any good title.

2. "Whatever else happens, strike out 'or if they do not agree, their "'several opinions,' and again twice 'or opinions.' To me this seems "objectionable, and almost to destroy the whole merit of the plan. It

"would be far better that the Court should simply throw overboard the "opinion of the whole, than that it should pretend and be authorized "to pretend to act as umpire between parts. The majority is *de jure* "the whole, and the President, without reference to his own individual "opinion, would subscribe, or a seal might be affixed, for the whole.

3. "I am doubtful about the assignment of reasons. If they are given "they are given to be debated. Now the opinion contemplated is in "everything but its being binding, a verdict; it is upon a matter exclu- "sively committed to those who deliver it, and I am afraid the reasons "would weaken the authority."—*Wilberforce's Life*, Vol. III., p. 107.

The use to be made of dissident opinions is well illustrated by the Minutes of the Commissioners' Meeting, April 13th, 1883, when the "opinion of Sir W. Erle, in the case of Martin *v.* Mackonochie," was presented by the Secretary of the English Church Union. (p. 15, ii.) The Minutes do not tell us whether the passage which the Rev. T. W. Perry suppressed on a former occasion had been restored; nor whether the letter of H. Reeve, Esq., C.B., D.C.L., the Secretary to the Privy Council, which appeared in *The Guardian* of January 24th, 1883, correcting Mr. Perry's mis-statements, was also submitted to the Commissioners. But the intention to detract from the weight of the Judgment in *Martin* v. *Mackonochie* can hardly have escaped their notice, and may even have inspired their recommendation.

3. In order to weaken the Court still further, it is provided that any *one* of the Judges may call for the opinion of the Archbishop and Bishops of the Province. (p. lviii.)

"Such an arrangement it is feared would have many practical incon- "veniences. When a man is tried for contravening the Articles and "Formularies he is accused of violating certain plainly written laws. Are "the Judges who try him, it is asked, not to use their own discretion in "pronouncing whether or no he has violated these laws? Are they to "refer to some other body to say what the written laws mean? Is this "other body then, to make what is equivalent to new laws for the parti- "cular case, or is it simply to direct the attention of the Judges to "passages in the old written law, which they had before them when they "made the reference? If the former, it is said, they are constituted a "perpetual Court of Legislation—a sort of *General Council in Commis-* "*sion*, to make new laws according to the Church's emergencies. If the "latter, their office is useless, and they cannot give the assistance which "legal Judges chiefly require, viz., advice on each point as it casually "arises in the sifting of the case, and guidance to the attainment of

" theological accuracy in the terms in which they clothe their Judgment. " It is fully granted that competent theological learning is necessary to " aid lawyers in the right application of Ecclesiastical laws; but must not " such learning, if it is to be of use, be found *in the Court itself* which " pronounces judgment, not in some other anomalous body to which the " Supreme Court makes some undefined reference?"—*Archbishop Tait, Pref. to Brod. and Fremantle.* (p. xvi.)

That this reference was *designed* to weaken the Court can hardly be doubted by any one who studies the evidence. Archbishop Tait asked (Q. 6440) :—

" If the bench of Bishops met and said, 'We hold a different opinion' " . . . . it would be a very awkward state of things? 'Yes,' replied Mr. " Beresford Hope, 'if they unluckily adopted such *form of words.*'" He added (Q. 6441):—"I think the thing might be done in such a form of words " that danger might be avoided. I fully agree with your Grace in object- " ing to make a *formal* defiance." Again (Q. 7006), " Supposing they " made a new Canon to set at naught the judicial decision? 'I do not " ' see why they should not,' said Dean Church, 'it seems a fair right of " ' the Church to do so.' 'Convocation need not consider the latter " ' Court?' 'Quite so.'" (Q. 7071.)

Any reader of the Report who will turn to Qq. 4413, 4396, 4409, 4538, 4596, 5466, 7335, 7364, 7551, or to the "Life of Bp. Wilberforce," II-352, will be able to judge whether this conclusion is not inevitable.

4. Lest, however, this should not suffice, Canons Westcott and Stubbs moved, March 16th, 1883, that the Bishops should take counsel and having regard "to the *circumstances of the time*, to issue " such statements on *subjects brought into dispute* as may seem to be " required." This, with slight verbal variations was adopted in the Report. (p. liv.) Whether the Bishops are to prejudice the case by fulminations while the "subject" is *sub judice;* or whether they are afterwards to issue a Counterblast in the form of an Allocution *urbi et orbi*, so as to lash up the "faithful" to resistance, is left by the Commissioners to the Episcopal "discretion;" but either way, its effect upon the "working of the Courts" could hardly have been contemplated in issuing a Royal Commission.

5. But the most conclusive proof that the Commissioners wish the control of the Appeal Court to be ineffective, is, that they give to it no power of enforcing its own decisions. (p. liv.) It is merely authorized to remit the cause to the Archbishop, sitting in person,

in order that "justice may be done." And the teaching of history is that justice may not be done. The Primate of All England and Metropolitan, sitting "in person," may not like to admit in public that there has been "lack of justice" on his own part. The Hon. C. L. Wood, President of the English Church Union, counts upon his resistance. "It is always open to the Archbishop and his "comprovincials to refuse" (Q. 937), and the Commissioners have provided no means either for compelling the Archbishop to take action, or for "justice being done" by some other "spiritual" person in his stead: yet they had admitted in words (p. liv.), that—

"IT IS DESIRABLE THAT ANY SCHEME SHOULD MAKE PROVISION FOR "COMPELLING ON THEIR PART OBEDIENCE TO THE LAW."

This "desirable" thing is not merely desirable; it is essential to any "working" of the Courts, and the Commissioners knew that "historic continuity" would necessitate some provision like that contained in the long series of statutes, including "the Great "Statute of Appeals" (p. 216-ii.), all of which provide severe penalties against the Ordinaries who neglect to execute Acts of Parliament.* Beside the penalty, the 25 Hen. VIII, c. 21 provided, "and over that "it shall be lawful to your Highness, for every such default, to give "power and authority, by Commission under your Great Seal, to "two such spiritual prelates or persons, to be named by your "Highness, as will do and grant such licences, faculties, and "dispensations refused, or denied to be granted by the said "Archbishop."—*Stephens' Eccl. Stat.*, p. 168.

One of the Commissioners, Bishop Mackarness, once told the House of Lords that "if by legislation Bishops were required to be the "deliverers of sentences prepared for them, some of the Bishops "might object to be mere machines in that way. To use a word of "the day, they might 'strike:'"† and the suggestion resulted in the omission from the "Public Worship Regulation" Bill of the original provision, which was that the Judge should "report" to the Bishop, and the Bishop should "give judgment." That

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* Among them are 23 Hen. VIII, c. 9; 23 Hen. VIII, c. 20; 25 Hen. VIII, c. 20; 28 Hen. VIII, c. 19; 3 and 4 Edward VI, c. 10; 2 Elizabeth, c. 4, Ireland; 5 Elizabeth, c. 28.

† Hansard, 219, p. 958.

Bill was, therefore, amended to enable the Judge to enforce his own decisions. And "historic continuity" would suggest a similar provision. For though the 37 Hen. VIII, c. 17, which regulates our Diocesan Courts to this day, and was, therefore, not reprinted in the Report, recites that canons forbidding lay or married persons to exercise ecclesiastical jurisdiction had been abolished, yet (says Mr. Gladstone, "Roy. Suprem.," p. 34), "the "Bishops and other spiritual persons *acted* at that date (A.D. 1545) "*as if* the disqualification had been still in force." The statement of the Act itself was, that the laws were "not used, nor put in practice "by the Archbishops, Bishops, Archdeacons, and other spiritual "persons, who have no manner of jurisdiction, but by, under, and "from your Royal Majesty." And this Judicial malversation of trust, it will be observed, was long after the Spiritual Persons had themselves publicly forsworn allegiance to the Pope.

"The thing that hath been, is that which shall be." "History," of which Canon Stubbs is a Professor, "is Philosophy teaching by "examples."

The Commissioners have shown how easy it is to exchange the Jurisdiction "AS modified by Reformation Statutes," for the "Whole Fabric" which was then so modified, and whose history they find it to "include." (p. xvi.) It will go hard, but our Priest-partisans shall better the instruction. We seem to hear the coming footsteps of the successor of S. Thomas of Canterbury, who shall haughtily defy the "Lay" Court of Appeal, which the Commissioners have rendered contemptible: and it may be that future Historians who chronicle the triumph of the "Church" over secular laws and institutions will trace the beginnings of the change to the "Report of the Royal Commissioners on Ecclesiastical Courts, "1883."

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By the same Author.

FIVE COUNTER-THEORIES

TO THE

RIDSDALE JUDGMENT.

PRICE FOURPENCE.

THE CATHOLIC DOCTRINE

OF

EUCHARISTIC SACRIFICE:

WHAT IS IT?

PRICE FOURPENCE.

LONDON:

E. MARLBOROUGH, 51, OLD BAILEY, E.C.